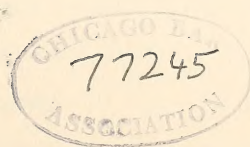


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NOV 8 '60

BOUNDS

37693

WILMA FOY,
Appellee,

vs.

DEALERS TRANSPORT COMPANY,
a Corporation,
Appellant.

10/60
1
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 6151

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for personal injuries against Dealers Transport Company, a corporation, and G.W. Thomas, plaintiff's brother. There was a jury trial and a verdict judgment for \$5700 against both defendants; defendant Dealers Transport Company appeals.

The record discloses that about four o'clock on the morning of May 15, 1931, plaintiff, a married woman, with her baby, was riding in a Ford coupe with her brother, the defendant G. W. Thomas, and Loyal Fairall, a young man. They started from LaGrange, Illinois, to drive to Corydon, Iowa, the former home of the three adults. When they reached a point between the villages of Lamelle and Dover, Illinois, about 100 miles from LaGrange, the Ford struck the rear end of a truck, injuring plaintiff. The Ford belonged to defendant Thomas, who drove the car from the time they started on their journey until they reached Mendota, when Fairall took the wheel and was driving the automobile at the time of the collision.

Plaintiff, her brother, the defendant Thomas, and Fairall all testified for plaintiff, and their testimony is that the three grew up together in Corydon, Iowa; that at the time in question plaintiff lived at Hinedale, Illinois, her brother Thomas at LaGrange, and Fairall in Iowa City, Iowa. They were driving to Corydon to attend a graduation in that city.

The night was dark and clear; the pavement of the road, about 18 feet wide, was dry and in good condition. The brakes of the

NOV 8 '06

10/10

APPEAL FROM SUPERIOR COURT

OF COCH COUNTY.

279 I.A. 615

27933

WILMA EBY,

Appellee,

vs.

DELMAR TRAMPORT COMPANY,
a Corporation,
Appellant.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for personal injuries against Defendant Delmar Tramport Company, a corporation, and D. W. Thomas, plaintiff's brother. There was a jury trial and a verdict judgment for \$2700 against both defendants; defendant Delmar Tramport Company appeals.

The record discloses that about four o'clock on the morning of May 18, 1905, plaintiff, a married woman, with her baby, was riding in a Ford coupe with her brother, the defendant D. W. Thomas, and LeRoy Kettell, a young man. They started from Ladangue, Illinois to drive to Corydon, Iowa, the former home of the three adults. When they reached a point between the villages of Lammie and Dover, Illinois, about 100 miles from Ladangue, the Ford struck the rear end of a truck, injuring plaintiff. The Ford belonged to defendant Thomas, who drove the car from the time they started on their journey until they reached Randolph, when Kettell took the wheel and was driving the automobile at the time of the collision.

Plaintiff, her brother, the defendant Thomas, and Kettell all testified for plaintiff, and their testimony is that the three grew up together in Corydon, Iowa; that at the time in question plaintiff lived at Randolph, Illinois, her brother Thomas at Ladangue, and Kettell in Iowa City, Iowa. They were driving to Corydon to attend a graduation in that city.

The night was dark and clear; the pavement of the road, about 16 feet wide, was dry and in good condition. The brakes of the

automobile were also in good condition.

Fairall testified that just before the accident he saw red lights on the highway between three and four hundred yards ahead; that he was driving at about forty to forty-five miles an hour and knew that the red lights were on some vehicle but could not see the vehicle; that as soon as he saw the lights he slowed up a little but did not apply his brakes; that when he was about three hundred feet away he saw that there was more than one vehicle in the road ahead of him but thought there was sufficient room to permit the Ford to pass between them; that he saw a man in the road leaning against one of the vehicles; that the two vehicles appeared to be on the opposite shoulders of the pavement; that when he was about three hundred feet away he put on his brakes a little; that the trucks came in full view when he was from seventy-five to one hundred feet away; that the road at that place ran about east and west and two wheels of the truck on the north side were on the shoulder; that the other truck was standing in the left lane on the pavement about parallel with the other truck; that when he was about seventy-five feet away he applied his brakes, and Thomas applied the emergency brake; he turned to the left to avoid the truck but was unable to do so, and the automobile skidded around and struck the truck standing in the left lane, injuring plaintiff.

Thomas testified that at the time of the accident all three were sitting in the one seat of the car, his sister to the right holding the baby in her lap, himself in the center, and Fairall driving; that he first saw the red lights ahead on the road when they were about 1500 feet away; that when they were about 300 feet away his sister asked Fairall if he saw the red lights; that the Ford was about seventy-five to one hundred feet away from the red lights when he realized that two trucks were ahead of them in the

Automobile were also in good condition.

Katrali testified that just before the accident he saw two lights on the highway between three and four hundred yards ahead; that he was driving at about forty to forty-five miles an hour and knew that the red lights were on some vehicle but could not see the vehicle; that as soon as he saw the lights he slowed up a little but did not apply his brakes; that when he was about three hundred feet away he saw that there was more than one vehicle in the road ahead of him but thought there was sufficient room to parallel the Ford to pass between them; that he saw a man in the road leaning against one of the vehicles; that the two vehicles appeared to be on the opposite shoulders of the pavement; that when he was about three hundred feet away he put on his brakes a little and the truck came in full view when he was from seventy-five to one hundred feet away; that the Ford at that time was about east and west and two wheels of the truck on the north side were on the shoulder; that the other truck was standing in the left lane on the pavement about parallel with the other truck; that when he was about seventy-five feet away he applied his brakes, and Thomas applied the emergency brake; he turned to the left so as to avoid the truck but was unable to do so, and the automobile collided around and struck the truck standing in the left lane, inflicting fatalities.

Thomas testified that at the time of the accident all three were sitting in the rear of the car, his sister in the right handing the baby in her lap, himself in the center, and Katrali driving; that he first saw the red lights ahead on the road when they were about 1500 feet away; that when they were about 300 feet away his sister asked Katrali if he saw the red lights; that the Ford was about seventy-five to one hundred feet away from the red lights when he realized that two trucks were ahead of them in the

road; that he pulled the emergency brake, Fairall applied the foot brake, and the car slid around and collided with the truck in the left lane; that at the time of the collision Fairall was driving from 25 to 30 miles an hour. The evidence further shows that there were two trucks with trailers transporting new automobiles to Davenport, Iowa. The witness further testified that the trucks were both standing still at the time of the collision and that he saw this when he was about 75 feet from them.

Plaintiff testified that when she first saw the red lights in the road ahead of them they were about two city blocks away; that when she first saw the lights she asked Fairall if he saw them and he replied that he did; that the Ford was traveling "pretty fast," she could not judge the speed; that when they were about 75 or 80 feet from the red lights she could distinguish two big trucks in the road; that she then told Fairall to slow down and that he heard her; she then saw there was going to be a collision and screamed.

Carl Johnson, called by defendant, testified that he was driving one of the trucks; that Earl Pitkin was driving the other; that on the evening of May 14th they left Hegewisch, Illinois, which is part of Chicago; that the two trucks were loaded with new Ford automobiles for Davenport, Iowa; that when they reached Sandwich, Illinois, they stopped and had something to eat; that the accident happened about 4:30 o'clock in the morning, just before daybreak, near Dover, Illinois, about 140 miles from Chicago; that the truck driven by Pitkin was ahead of Johnson; that Pitkin had pulled the truck to the north of the pavement and was parked on the shoulder; that as he approached Pitkin's truck he could see red lights about three-quarters of a mile ahead on the truck; that there were five red lights on the rear of each truck; that when he was about 200 feet away he could recognize the outlines of Pitkin's truck; that it was standing still, Pitkin had his left arm out waving for the

...that he pushed the emergency brake, which caused the car
to stop, and the car did not move and remained with the front in the
left lane; that at the time of the collision between the two cars
there was no other car nearby. The evidence further shows that there
were two people in the vehicle immediately after the collision in the
left lane. The witness further testified that the vehicle was
standing still at the time of the collision and that he was alone
when he was about 75 feet from them.

Witness testified that when the first car was in the left lane
the rear wheel of the car was about 10 feet from the left lane
and the front of the car was about 10 feet from the left lane. The
witness further testified that the car was traveling "fairly fast," and
could not judge the speed; that when they were about 75 feet from
them the red light was still flashing and the car was in the
left lane; that when the car was about 75 feet from them and that he heard him;
the car was about 75 feet from them and that he heard him.

Carl Johnson, called by defendant, testified that he was
driving one of the trucks; that Carl Johnson was driving the other;
that on the evening of May 19, 1954, they left Chicago, Illinois, and
in part of Chicago; that the two trucks were loaded with new tires
manufactured for defendant, and that when they reached Chicago,
Illinois, they stopped and had something to eat; that the defendant
suggested about 10:00 o'clock in the morning, that he and defendant
went to the Illinois, about 10:00 o'clock from Chicago; that the truck
driver of the truck was about 10:00 o'clock from Chicago and called him
from the back of the truck and was about 10:00 o'clock from Chicago;
that at 10:00 o'clock from Chicago he was with the truck; that
defendant of a light truck on the street that was about 10:00
the truck at the time of the collision; that when he was about 75
feet away he could recognize the vehicle of the truck; that
he was standing still, Illinois had his left arm and pointing for the

as witness to pass him and to go ahead; that ^{as} he passed the truck he was driving on the right or north lane of the pavement; that as he was passing he heard a squeaking of brakes and immediately after the Ford smashed into the back of his truck; that at the time of the collision his truck was going about 15 or 18 miles an hour.

Fitzkin testified that he was driving one of the trucks loaded with automobiles to Davenport; that Johnson was driving the other; that after leaving Hedgewich they met at Sandwich where they had something to eat; that when he was between Lenoire and Dover he stopped because he did not see Johnson behind him; that Johnson's truck was slower than the one the witness was driving; that he pulled off the pavement to the north and parked on the shoulder and waited about eight or ten minutes for Johnson to come up; that when Johnson approached he was driving in the north or right lane; that he motioned for Johnson to come ahead and take the lead; that he stuck his left arm out of the window and signalled him to pass him; that as Johnson was passing he was traveling in the north lane, and there was a crash. This is substantially all the evidence as to how the accident occurred.

Defendant contends that it was guilty of no negligence because the evidence shows that one of its trucks was standing north of the pavement on the shoulder, and the other traveling in the north lane and did not stop prior to the accident; that even if it be assumed that the question of defendant's negligence was for the jury, such negligence, if any, was not the proximate cause of the collision with the resulting injuries to plaintiff, and therefore the court should have directed a verdict for defendant, as requested.

It seems to be the theory of plaintiff that Fairall, at the time in question, was driving the Ford car as agent of Thomas and therefore both Thomas and Fairall were guilty of contributory negligence, but that such negligence is not imputable to plaintiff who

was riding as a guest in the Ward. Under the law the negligence of Thomas or Fairall could not be imputed to plaintiff. But before she could recover she must prove that she was in the exercise of ordinary care for her own safety (Gao v. Fryer, 294 Ill. 333), and must also prove by a preponderance of the evidence that the defendant was guilty of negligence which proximately contributed to her injury.

Par. 161 (2), page 2426, Cahill's 1933 Statutes, provides that "No driver of a vehicle shall stop the same on any turnable hard surface State highway or allow it to stand in such position that there is not ample room for two vehicles to pass upon the road, nor shall any person unload his cargo or transfer it from one vehicle to another, except in case of emergency, upon such highway."

Plaintiff's evidence tends to show that defendant violated this statute at the time in question. Defendant's evidence was to the contrary. Plaintiff's evidence tends further to show that plaintiff was in the exercise of due care for her own safety, having called the attention of the driver to the lights ahead of them in the road. In these circumstances, the questions of defendant's negligence, and whether plaintiff was in the exercise of due care for her own safety, were questions for the jury. By its verdict it found in favor of plaintiff's contention, and upon a consideration of all the evidence in the record we think we are not warranted in disturbing the finding of the jury on these questions.

But assuming that plaintiff proved she was in the exercise of due care for her own safety, and that defendant was guilty of negligence, the question remains whether the negligence of defendant was the proximate cause of plaintiff's injuries. Defendant strenuously contends that its negligence, if any, was not the proximate cause of plaintiff's injury; that such negligence at most merely

furnished a condition which made the collision possible and that plaintiff was injured through the independent negligence of the driver of the Ford, and in these circumstances defendant is not liable.

What is the proximate cause of actionable negligence has been the subject of many decisions of this court and of our Supreme court. In Smith v. Conn. Elec. Co., 241 Ill. 252, the court in discussing this question, speaking by Mr. Chief Justice Cartwright said (p. 259): "To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence." (p. 260.)

The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and if so, the connection is not broken."

In Heiting v. C.R.I. & P. Ry. Co., 252 Ill. 456, the court, speaking by Mr. Justice Dunn, said (p. 471): "If it can reasonably be concluded from the evidence that the accident would not probably have happened except for the failure of the appellant to fence its track, then it follows that the neglect to fence was the proximate cause of the accident, unless some other disconnected efficient cause which could not have been foreseen by the exercise of ordinary care has intervened."

To the same effect is Hartnett v. Boston Store of Chicago, 265 Ill. 351, where it is said (p. 354): "That constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of

...and a condition which was the condition precedent to the
...injury was caused through the negligent negligence of the
...driver of the car, and in these circumstances it is not

...is not.

What is the principle of contributory negligence and

from the fact of contributory negligence of the plaintiff and of the defendant
...In Wright v. Carter, 100 Ill. 411, 412, the court in its

...injury was caused through the negligent negligence of the

...the negligent negligence of the plaintiff, and he is

...such character as an exclusively negligent person would be liable for

...even might probably occur as a result of the negligent negligence of the plaintiff

...The fact is further that the plaintiff was not at all negligent

...and probably negligence of his own negligence, and it is, the court

...question is not stated."

In Wright v. Carter, 100 Ill. 411, 412, the court

...stating by Mr. Justice Carter, said (p. 411): "It is the negligence

...to maintain that the plaintiff was the negligent negligence of the plaintiff

...have happened merely for the failure of the plaintiff to keep the

...fact, then it follows that the plaintiff is liable for the negligent negligence

...negligence of the plaintiff, unless some other negligent negligence

...cause which would not have been caused by the negligence of the plaintiff

...have been caused."

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...have been caused."

To the same effect is Wright v. Carter, 100 Ill. 411, 412, the court

...stating by Mr. Justice Carter, said (p. 411): "It is the negligence

the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act."

And in the Helling case, supra, the court, further discussing the question of the proximate cause of an injury, said (pp. 473-474): "In cases involving quite similar facts different courts have arrived at opposite conclusions. The question for our determination is whether there was any evidence requiring the submission of the question of proximate cause to a jury, and if the facts are such that men of ordinary judgment may arrive at different conclusions as to whether or not a fence would probably have prevented the accident, then the condition was such as required the submission of the case to the jury."

In the instant case, the night was dark but clear; there was evidence to the effect that both lanes of the pavement were occupied by the two trucks and the question for decision then is, might an ordinarily prudent person have foreseen that a collision might probably occur? We think this question was for the jury. In these circumstances the court did not err in denying defendant's motion for a directed verdict.

Complaint is also made that the court erred in refusing to instruct the jury at defendant's request, that the statute of Illinois required motor vehicles to be equipped with headlights visible at least 200 feet in the direction the vehicle is approaching, and that this statute was intended to provide a light for the guidance and benefit of the person driving the automobile as well as for the protection of others who use the highway. The court instructed the jury on this statute except that it did not tell the jury the lights were for the benefit of the person driving the automobile as well as for others who were using the highway. The argument is that the evidence shows the lights on the Ford automobile threw light

the negligence, although it is not essential that the person charged with negligence should have been in the position of a person charged with negligence.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

to the fact that the defendant was not a party to the same.

There is no doubt that the above is a true and correct copy of the original document. The original document is a letter from the Secretary of the Department of the Interior to the Commissioner of the General Land Office, dated at Washington, D.C., January 10, 1894. The letter is addressed to the Commissioner of the General Land Office, and is signed by the Secretary of the Department of the Interior. The letter is a copy of a letter from the Secretary of the Department of the Interior to the Commissioner of the General Land Office, dated at Washington, D.C., January 10, 1894. The letter is addressed to the Commissioner of the General Land Office, and is signed by the Secretary of the Department of the Interior.

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only about 100 feet ahead of the Ford, as defendant Thomas testified; that these lights were not in compliance with the statute. We think the instruction was properly refused since no request was made that the court apply the instruction to the evidence in the case. Moreover, the three adults in the Ford testified they saw the trucks when they were several hundred feet ahead of them. It is certain that in no event was defendant prejudicially affected by the refusal to give this offered instruction.

It is also contended that the court erred in refusing to instruct the jury (as defendant requested) that the exercise of ordinary care by the driver of the vehicle in a public highway only required him to look ahead while driving and that there was no duty upon him to look backward to ascertain the position of persons approaching from the rear. We think it obvious that no juror who is presumed to have the qualifications required by our statute would surmise that it was the duty of the driver of the truck in question to look back to see whether there might be a rear-end collision. We think this instruction could serve no useful purpose.

After the verdict was returned the court permitted plaintiff to file three additional counts of her declaration, over the objection of defendant, and this action is complained of on the ground that the amended counts introduced new matter into the case. In this connection it is said that the second and third additional counts charged it was the duty of the defendant, Dealers Transport Company, not to stop either of its motor trucks on the paved portion of the highway, etc. But this identical allegation was made in the counts that were in the declaration when the case went to the jury. There was no different charge in the additional counts in this respect.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Hatchett, JJ., concur.

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that in no event was there any prejudicial effect of the in-
vestigation in this case against the defendant.
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27827

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ROBERT BOWMAN,
Plaintiff in Error.

27827
RETURN TO CRIMINAL COURT
OF COOK COUNTY.

279 I.A. 615²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Theodore Greark and Robert Bowman were indicted by the grand jury of Cook county for a conspiracy to take bribes, etc. The jury returned separate verdicts finding each guilty as charged and the defendants were sentenced to a term of one year in the House of Correction, "no fine and no costs." Greark did not seek a reversal of the judgment. Defendant Bowman has sued out this writ of error. The indictment is in seven counts. The first charged that the two defendants conspired with diverse other persons unknown unlawfully to extort money from the public by verbally threatening to accuse them of driving automobiles at excessive speed and in disregard of traffic lights.

In the second count it was charged that the Village of Miles Center was incorporated and that ordinances were in force which were duly adopted by the President and Board of Trustees of the Village creating the offices of Marshall, Captain of Police, and Police Officers of the Village; that Greark was appointed and acted as Village marshall and police officer, and Bowman was appointed acting captain and police officer; that diverse persons were unlawfully driving automobiles at unreasonable speed and without regard to traffic lights and otherwise in violation of law; that it became the defendants' duty to arrest such persons or cause them to be arrested and prosecuted. But the defendants betrayed their trust and conspired with each other and with other persons to corruptly accept money as bribes from the persons who were violating the law in driving

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automobiles.

In the third count it was charged that defendants were appointed police officers under certain ordinances of the village; that it was their duty "to arrest, to cause to be arrested, to prosecute and to cause to be prosecuted" the persons unlawfully driving automobiles; that the defendants conspired with each other to take bribes from such law violators so that such violators would not be prosecuted.

The fourth count charged that the defendants were police officers; that they knew arrest slips had been given to persons for traffic violations by other police officers; that it was defendants' duty to prepare complaints in writing before the Police Magistrate charging such offenders with such violations, but that defendants conspired together and failed to present such complaints and were thereby guilty of compounding such offenses.

The fifth count was nolle prossed by the State.

In the sixth count the defendants were charged with conspiracy to obtain \$1000 from the public by means of the confidence game; and in the seventh count, that they conspired to obtain \$1000 from the public by means of false pretenses.

Twenty-three witnesses testified for the State. Ten of these testified to money payments made to Greark and that charges of traffic violation made by other police officers of the Village were dropped. Of the twenty-three witnesses called by the State two testified they gave money to defendant, Bowman, and that the charges made against them were not brought before the Police Magistrate of the Village. Bowman denied he had received any money from the two persons who gave testimony against him, and denied he had received any money at any time from anyone in connection with any traffic violations by automobilists.

Bowman was born in Illinois, was thirty-six years old and

was brought by his parents to Cook county when one year old. He enlisted in the United States Army in which he served five and a half years. He saw service in the Philippines and was overseas for two years and four months during the World war and was engaged in a number of battles in France. After his return he moved to Wheeling where he was chief of police for more than a year. In 1923 he was employed by the Village of Miles Center, through the president of the Board of Trustees of that village. He served on the police force of the village until the time of the trial; during part of that period he acted as chief of police; at the time the indictment was returned against him he was night captain of police, subject to the orders of the chief of police. He had never been arrested and had never had any trouble of any kind until the indictment was returned. Sixteen witnesses testified that prior to the indictment his reputation for honesty and integrity was good. There was no evidence to the contrary.

The evidence disclosed that during May, June and July, 1923, police officers of the village arrested a number of persons charged with driving automobiles in violation of traffic regulations, such as excessive speed, running through red lights, illegal parking, etc.; that most of such persons were given arrest slips by which they were notified to appear before the police magistrate of the village at certain times; that many of the persons who had been given such slips were not prosecuted and that no charge was lodged against them before the magistrate; that in many instances the arrest slips were "pulled" at the request of divers persons and that in many of such cases no money was given for such failure to prosecute.

The two witnesses who testified they gave money to the defendant, Bowman, to prevent the pressing of traffic violations against them were Harold E. Watson and Stuart Betterholm.

Watson testified that on July 1, 1933, he was driving through the village of Miles Center on his way to play golf; that he passed through a red light at a street intersection and was arrested by motorcycle officer Griffin, who gave him a ticket or arrest slip; that Griffin called his attention to driving through the red light which witness "readily admitted" he had done; that upon receiving the ticket witness put it into his pocket and went on his way; later he examined the ticket and noticed that it called for his appearance on the following Saturday at the Town hall in Miles Center, before the Police Magistrate. He further testified that he was going to be out of the city at that time, and he then drove to the Town hall in Miles Center and spoke to defendant, Bowman, showed him the ticket and told him he would not be able to appear on Saturday as he was going to leave the city, and asked if the matter could not be arranged "right away"; that Bowman stated that if he appeared in court it would probably cost witness \$15 or \$20, but Bowman said, "Fix it up with \$5;" that he then gave Bowman \$5 and the ticket; there is evidence in the record to the effect that no complaint was filed and nothing further done in the matter.

Officer Griffin testified that he was a motorcycle officer; that he rode a motorcycle for the purpose of making arrests for violation of village ordinances; "we have speed ordinances and red light ordinances;" that he went to work for the Village in June, 1933, but made no arrests during that month; that he arrested Watson July 1st for running through a red light in the village; that he gave him a ticket and turned in a duplicate at the office of the chief of police in the town hall; that the ticket called for the attendance of Watson in the town hall on July 6th, at 3 p. m.; that he did not go to court that day; that prior to that time he asked defendant, Bowman, if the ticket would be in court and that Bowman said "No," that the ticket had been "pulled"; that he afterward talked to the chief of police, Greak, about the case and asked if

4

Watson testified that on May 1, 1934, he was driving down
the Village of Little Canada on his way to work; that he passed
a red light at a street intersection and was stopped by
a patrolman Officer Smith, who gave him a ticket for wrong way;
that Officer Smith called him attention to Officer Smith and Officer
Smith witness "Smith" he was told that when receiving
the ticket Watson was at that time and went on his way; later
he examined the ticket and noticed that it stated that his car was
on the Village of Little Canada at the time he was stopped, but
the ticket stated that he was stopped at the Village of Little
Canada at the time he was stopped, and he knew that he was not
in Little Canada at that time, and he knew that he was not
and that he would not be able to answer the question as to how
he came to leave the city, and asked if the ticket could not be
changed "Smith" said that he would change it if he was in
error it would probably cost Watson his job, but Watson said,
"What is my job?" that he then gave Watson his job the ticket;
there is evidence in the record to the effect that no complaint was
filed and nothing further done in the matter.

Officer Smith testified that he was a patrolman in the
that he was a patrolman in the Village of Little Canada at
the time of Watson's apprehension; that he was issued a ticket for
wrong way; that he went to the Village of Little
Canada, and made no record being that he was stopped by
Officer Smith for passing a red light in the Village; that he
gave him a ticket and turned in a duplicate of the ticket at the
office of Smith in the same hall; that the ticket could not be
changed at that time in the same hall in the same hall, as it was
he did not go to court that day; that when he was told he must
be released, Watson, he was released and he is now in the same
hall "Smith" said that Watson was "released"; that he "released"
Watson in the hall of release, Smith, about the same and asked if

he was to appear in court at the time mentioned; that the chief replied no, the ticket was fixed; that he did not appear because he understood the ticket had been withdrawn. On cross examination he testified he received his appointment as police officer through a trustee of the Village and that it was customary in the Village to do political favors by often withdrawing arrest slips.

Stuart Zetterholm, called by the People, testified that about ten or eleven o'clock on the night of June 24, 1937, he was arrested for speeding in Miles Center by officer Sils and taken to the police station where he was kept until about one o'clock that night, at which time a friend of his brought eighteen dollars to the station, which was put up and he was released on bond; that the next day, Sunday, he went back to the town hall in Miles Center pursuant to a telephone call to his wife, of which he was notified by his sister; that he saw Chief Groark in the latter's office; that Groark asked the witness if he would be able to be in court on Saturday; witness replied that he would but it would be "kind of hard," and that Groark asked him if he could do anything for him; that Groark then drew a book out of the drawer of his desk and showed him the amount of some fines which had been imposed for running through lights and speeding in other cases, "and he asked me if he took out the \$8 for the fine if it would be all right with me;" that witness said it would; that just then Captain Bowman came in; thereupon Groark explained to Bowman what he had done for witness; Groark then left the room and Bowman opened the drawer and gave witness \$10 of the \$18 which had been deposited; that he never received the other \$8 and never went to court. Witness further testified that the \$18 was brought to the station by a friend of his, Mimi Lewis.

Lewis testified that in response to a call he took \$18 to the police station at Miles Center at the time in question and left the money there to bail out Zetterholm; that he got a receipt

for the money; that the next day he gave Zetterholm the receipt and that some days afterward Zetterholm paid him back the \$10.

Officer Nils testified that during June he was a motorcycle officer of Miles Center, patrolling streets. He identified a copy of the arrest slip he had given Zetterholm June 24th in which Zetterholm was charged with speeding; that he arrested Zetterholm and took him to the station and he was locked up.

Greark testified that he did not talk to Zetterholm at the station and say, "I had a list of fines and that I could fix it up;" that he did not remember a cash bond being deposited by Zetterholm "or a friend of his by the name of Mini Lewis, a colored gentleman;" that he did not remember Zetterholm afterward, asking him about the \$10 that had been put up for the bond; that he never saw Zetterholm until the trial.

Bowman testified that he was a police officer in Miles Center since 1923; that it was the general practice in Miles Center to withdraw arrest tickets or have them fixed without any consideration; that this was done as a political favor; that he never took any money from anybody for "pulling" a ticket; that Watson did not give him \$5; that he never saw Watson or had any knowledge of how his ticket was fixed; that he never took any money from Zetterholm; that he remembered nothing in connection with his case; that it was the practice when cash bond was given to give a receipt for the money, and that later when the matter was disposed of, to return the money to the depositor; that he was not at the police station the afternoon of June 25th, when Zetterholm testified he went to the station and received the \$10; that his hours were from 8 p. m. until 4 a. m.; that he did not give Zetterholm \$10 which had been deposited as a cash bond by Zetterholm; that it was the practice to return any money which was put up for cash bond, not to the person who gave the bond, but to the person making the deposit, unless the latter gave a

written order to the contrary; that at no time prior to the indictment was any charge made against him of ^{any} wrongdoing.

There is considerable other evidence in the record, some of which will be hereinafter referred to.

Defendant contends that there is no evidence which tends to prove that Bowen was guilty of conspiracy with Greark or with any other person. The essence of a conspiracy is the unlawful combination or agreement to accomplish a criminal or unlawful purpose. People v. Drury, 335 Ill. 539. We think there is some evidence that would tend to support the charge of conspiracy. Setterholm's testimony, which we have heretofore discussed, might tend to show an agreement between the two defendants to unlawfully accept money from him. This is conceded by counsel for defendant, but it is said that Setterholm was an accomplice and therefore his testimony is entitled to little weight; that his testimony is "so full of inconsistencies and conflicting statements as to be unbelievable;" that it is impossible to reconcile his testimony with that of Lewis, whose testimony also has been heretofore mentioned. We think the question was one for the jury in the first instance, but whether, upon a consideration of all the evidence there is a reasonable doubt on this phase of the case obviously is for the court.

Complaint is also made that the evidence was insufficient to sustain the allegations of the second count (which charged the violation of ordinances of the Village of Niles Center) for the reason that no ordinances or any other evidence was offered on this question. In this connection counsel for defendant say that as a matter of fact there are no ordinances of the Village of Niles Center defining the duties of Captain of Police, the violation of which was alleged in the second count. Under the provisions of section 1 of chapter 31, Cahill's 1923 Statutes, page 1410, every court of original jurisdiction is required to take judicial notice

written order to the contrary; and if no such order is made in the
case, the court shall have authority to do as it thinks fit.

There is considerable direct evidence in the record, some of
which will be hereinafter referred to.

Reference is made to the fact that there is no evidence which tends to

show that James was guilty of conspiracy with anyone as well as
himself. The absence of a conspiracy in the United States
does not prevent its recognition as a criminal offense.

James I. Smith, 1871-1880. We think there is some evidence
that would tend to support the charge of conspiracy. Evidence
tends to show that James was guilty of conspiracy, which tends to show
an agreement between the two defendants to unlawfully secure money
from the bank. This is supported by several other facts, and it is

well that James was an associate and confederate of his brother
in crime in this regard; and his testimony is not reliable.
Investigation and conflicting statements as to his character.

That it is impossible to reconcile the testimony of James I. Smith
with the testimony of the other witnesses is not shown. It
is not the question we are to try in this case, but
whether, upon a consideration of all the evidence there is a
preponderance in favor of the testimony of the other witnesses.

Conclusion is also made that the evidence was insufficient
to sustain the charges of the grand jury against the
defendants as accessories of the crime of James I. Smith for the
crime of the conspiracy of the other witnesses was sufficient to
show that the conspiracy was not a mere

matter of fact there are no witnesses of the crime of James
I. Smith, and the charges of conspiracy are not sustained.
There was a trial in the second court, under the provisions of
section 2 of chapter 12, Smith's 1881 Statutes, page 125, 126,
which of section 125 is repealed in the Statutes of 1881.

of all general ordinances of a municipality, and by sec. 2 of that Act this court is likewise required to take judicial notice of all matters of which the trial court was required to take judicial notice. But such ordinances, if any, should be brought to our attention in the brief, or otherwise. The statement of counsel for defendant that there are no such ordinances has not been challenged by counsel for the People. Under the second count we think it was necessary for the People to make proof of the provisions of the Village Ordinances on the question alleged in the second count.

Defendant further contends that the court erroneously permitted police officers to testify, over his objection, that only certain percentages of the number of persons given arrest slips by them appeared in court; that this evidence was incompetent and highly prejudicial because the evidence shows that a great many arrest slips had been withdrawn or "fixed" at the request of a number of persons other than the police force of the Village. We think this contention must be sustained. The fact that a large number of arrest slips were given by police officers to persons charged with violating traffic regulations and that a great many of such persons did not appear in court, would in no way tend to prove that Bowman was responsible for the failure of such persons to appear before the police magistrate, and yet the jury might have thought he was to blame.

Officer Harrer was asked, "What percent of persons appeared in court as a result of tickets that you issued?" and over defendant's objection he answered, "About fifty per cent." A number of other police officers were asked similar questions and answered, giving various percentages. We think all such evidence was erroneously admitted and was prejudicial to defendant.

In the instant case the defendant, Bowman, was 36 years old, had been on the police force in the Village of Ellen Center

[illegible]

For about ten years; he had always borne a good reputation for honesty and integrity and as a law-abiding citizen; he had never been charged with any offense prior to the returning of the indictment in the instant case, and the only evidence against him is that on one occasion he received a few dollars. Most of the evidence of wrongdoing introduced on the trial was against the other defendant, Greark.

For the reasons stated the judgment of the Criminal court of Cook county is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

McSurely and Matchett, JJ., concur.

[illegible]

For the reasons stated the balance of the original award of \$200,000 is reversed and the award remanded.

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37585

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error.

vs.

JOHN BRODSKY,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

279 I.A. 615³

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with contributing to the delinquency of a minor child and upon trial by the court was found guilty, sentenced to imprisonment in the house of correction for one year and fined \$200. He seeks a reversal.

Counsel for defendant first says that the court erred in overruling defendant's motion to quash the information upon the alleged ground that the charge is uncertain - that the information charges that defendant wilfully encouraged the complaining witness, Betty Rydeen, "to be or to become" a delinquent child. It is argued that the use of the word "or" is a fatal defect. The word "or" in an indictment is a fatal defect only when its use renders the statement of the offense uncertain. People v. Farrell, 349 Ill. 129. The offense charged in the information in question is not made uncertain by the use of the word "or", and is in the language of the statute.

Moreover, the motion to quash was made orally, without designating any particular part of the information as defective. This motion amounted to a general demurrer which calls in question defects in substance only and not those merely of form. People v. Fox, 346 Ill. 374.

The only substantial defense presented is the identification of the defendant as the person guilty of the acts charged. The offense was alleged as having occurred September 16, 1933. Betty Jane Rydeen testified that she was eleven years of age at that time, in

the sixth grade at school; that on that date she saw the defendant at 34th street and Calumet avenue at 10:30 or 11:00 o'clock in the morning; he had his car parked and was walking around; that he called her to come over to his car and said to her, "Do you want to see something funny?"; that he opened his trousers, exposing his private parts, and made a most obscene suggestion to her; that she ran away from the car and to her home and told her mother what had happened. She next saw him January 4, 1934, when he was locked up; she identified him as the man she had seen September 16th; she was positive he was the man as both times he was in a dirty colored green Plymouth car - a two door sedan; she did not remember the kind of clothes he wore but remembered that he wore a green hat.

Upon the trial she was asked whether she saw the defendant in the court room and first said she did not see him, but a few minutes later she said she "just saw him" - the man sitting over there

Bonnie Hoyer, ten years of age, was with Betty Rydeen on September 16th and heard the defendant call Betty, saying he wanted to ask her a question; that she did not pay any attention until she heard Betty exclaim, "Oh!" and her face turned white, and Betty told her what the man had done. Both girls told their mothers. She also testified that she next saw defendant January 3rd; that he was in a green Plymouth car and came outside the car and beckoned to her; that she went home and told her mother, who watched the defendant out of the window and told someone in the house to call a policeman. The police came to the house and the witness, Bonnie, described the man to them. The police then arrested defendant and brought him to the house where the witness identified the defendant. Witness says she is positive that the man arrested was the man she had seen who accosted Betty Rydeen on September 16th.

William Macerason testified that he was a police officer of the city and that he knew both Betty Rydeen and Bonnie Hoyer; that

The ninth grade at school; that on that day the defendant
at that time was in the school at 1:30 p.m. in the
evidence; he had his car parked and was waiting around that
called him to come over to his car and said to him, "Go over
to see something funny"; that he opened his door, expecting
his private party, and made a noise because he was in the car; that
she ran away from the car and to her home and left her father and
and defendant. The fact that the defendant, 1935, when he was located
up; she identified him as the man who had been defendant's father; she
was positive as to the man as being the man in a dirty white
green T-shirt and a red head band; she did not remember the kind
of clothes he wore but remembered that he wore a green hat.
Upon the trial she was asked whether she saw the defendant
in the court room and she said she did not see him, but a few
minutes later she said she "saw him" - she was sitting over the
Bernice Meyer, ten years of age, was with Betty Ryerson on
September 1935 and heard the defendant call Betty, saying he wanted
to ask her a question; that she did not say any question until she
heard Betty answer, "Yes"; and that she heard Betty, and Betty said
that what the man had done. Betty said she heard mother. She also
testified that she heard her father's name; that he was in a
green T-shirt and had some white in his hat and he was in the
that she went home and told her mother, who watched the defendant on
of the school and told someone in the house to call a policeman. The
police came to her house and the witness, Bernice, described the man
to them. The police then arrested defendant and brought him to the
house where the witness identified the defendant. "I never saw him
in police court and was arrested and was not seen him and was
called Betty Ryerson on September 1935.
Bernice Ryerson testified that she was a police officer at
the city and that she was with Betty Ryerson and Bernice Meyer; that

he saw Betty Rydeen January 3rd at the Burnside police station; that he called on Mrs. Hoyer, who described the defendant, whom the officer arrested and brought back to Mrs. Hoyer's home and asked Bonnie if this was the man; that she said he was and that he was the same man who had nodded to her "today" and tried to call her over to his car, and that he was the man who had exposed himself to Betty Rydeen; that he told his fellow officer to take the defendant to the police station and he went to the home of Betty Rydeen; that at the station both children positively identified the defendant.

Defendant testified in his own behalf that he worked at a bookish place on Cottage Grove avenue; that he got to work every morning at about 11:30; he denied the offense; denied he was in the vicinity of 84th and Calumet avenue September 16th, but said he was there January 4th and was waiting for his sister-in-law to come out of the church when he was arrested by the police officers; he denied that he exposed his person to the Rydeen girl September 16th, denied he had ever said anything to her, and said he had never seen either of the girls before he was arrested.

Another witness, a girl thirteen years of age, in the eighth grade of school, upon the trial pointed out the defendant as the man who about the middle of September she had seen on the sidewalk at 65th and Prairie avenue; that at this time he got out of his car and stood up and whistled; that he opened his trousers, exposing himself; that she was about thirty feet from him when he did this, and the witness ran away. Another girl witness, twelve years old, testified that she saw the defendant September 16th at about 10:00 a. m., on 65th street, between Indiana and Michigan avenues; that she saw him unbutton his trousers and expose himself. This witness identified the defendant in the court room at the time of the trial.

This is a case where the credibility of the witnesses is peculiarly within the province of the trial court to judge. The

court had the opportunity to observe the demeanor of the witnesses on the stand, their intelligence and the reasonableness of their stories. The identification of the defendant by the witnesses was positive. We would not be justified on a review of the evidence in disturbing the conclusion of the court on this question. In People v. Schladweiler, 313 Ill. 393, where the identification of the defendant was in question, the court said that since the identification in that case was positive the reviewing court would not disturb the judgment of the trial court. This is applicable to the instant case, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

...and had the opportunity to observe the movements of the witnesses
on the stand, their testimony and the testimony of the witnesses
...The identification of the witnesses by the witnesses was
...he would not be identified as a witness of the witnesses
...in identifying the witnesses in the case as the witnesses. In
...United v. [redacted], 111 F. 2d, where the identification of
the witnesses was in question, the court said that where the identifi-
cation is that there was evidence the witnesses could not
identify the defendant of the trial court. This is applicable to the
instant case, and the judgment is affirmed.

REVEREND.

Witness, J. L. and witness, J. L. witness.

37610

J. P. FRILEY,
Appellant,

vs.

JACOB G. LEVINSON and
SADIE LEVINSON,
Defendants.

LOUIS LIEBLING, Intervening
Petitioner,
Appellee.

REYVAL BUILDING CORPORATION,
a Corporation,
Garnishee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 616¹

MR. JUSTICE ROSENBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, J. P. Friley, having a judgment against Jacob G. and Sadie Levinson, garnisheed the Reyval Building Corporation; Louis Lieblich filed an intervening petition claiming the amount due from the garnishee; upon hearing the court found for the intervening petitioner and gave judgment against the garnishee for \$1316.50, for the use of the intervening petitioner.

Plaintiff appeals, first making the point that the judgment is irregular in form, asserting that it is not proper to enter judgment in favor of an interpleader, citing Glover v. Wells, 40 Ill. App. 350, and Walton v. Detroit Copper & Brass Rolling Mills, 37 Ill. App. 264. Counsel for the intervening petitioner properly replies that at the time these cases were decided there was no statutory authority for the entry of judgment directly in favor of an intervening petitioner excepting for costs, but that subsequently the legislature, in 1931, by amendments to both the garnishment and attachment acts, permitted such judgments. Chap. 62, sec. 12, Illinois Statutes (Cahill), the statute on garnishment, and chap. 11, sec. 29, Illinois Statutes (Cahill), the statute on attachments. These statutes authorize the entry of judgment directly in favor of the intervenor. The judgment in this case was entered in proper form.

U. S. DEPT. OF JUSTICE
Washington, D. C.

JACOB G. LARSEN and
JANIS LARSEN,
Defendants.

JOHN LARSEN, Defendant,
Respondent.

JOHN LARSEN, Defendant,
Respondent.

JOHN LARSEN, Defendant,
Respondent.

JOHN LARSEN, Defendant,
Respondent.

JOHN LARSEN, Defendant, Respondent.

JOHN LARSEN, Defendant, Respondent.

JOHN LARSEN, Defendant, Respondent.

JOHN LARSEN, Defendant, Respondent.

Plaintiff's principal contention is that the claim of Louis Lieblich, intervening petitioner, was based upon a fraudulent transaction. To consider this point necessitates a recital of the transactions.

November 22, 1933, Eli Herman executed his chattel mortgage conveying to Jacob G. Levinson certain chattels, consisting mainly of law books located in a room of the building controlled by the Keywal Building Corporation, of which Herman was a tenant.

August 25, 1933, the plaintiff, Friend, recovered a judgment against the defendants Jacob G. and Sadie Levinson for \$16,195.95.

About October 10, 1933, the Keywal Building Corporation distrained for rent against Herman and seized the property described in the chattel mortgage to Levinson.

Levinson, as mortgagee of the Herman mortgage, filed a replevin suit for possession of the distrained chattels against the Keywal Building Corporation.

October 23, 1933, Levinson executed his note in the sum of \$1500, payable to the intervening petitioner, Lieblich, and to secure its payment executed his collateral agreement pledging to Lieblich the Herman note and chattel mortgage, above noted.

January 19, 1934, Levinson recovered a judgment in trover for \$1300 in his replevin suit against the Keywal Building Corporation. On this same day Friend, by virtue of his judgment against the Levinsons, served the Keywal Building Corporation with garnishee summons, but on the same day, before the service of the garnishee summons, Levinson assigned the judgment in trover obtained against the Keywal Building Corporation to Lieblich, the intervening petitioner, and a notice of this assignment was later on the same day served upon this corporation, the garnishee.

January 29, 1934, Lieblich filed his verified intervening petition setting forth the above facts and asserting that by reason

Plaintiff's principal contention is that the trial of
last night, although irregular, was held with a reasonable
transparency. To consider this being reasonable a matter of law
transparency.

January 11, 1915, the defendant was charged with
conspiracy to defraud the defendant, and the defendant
at the time located in a room of the building controlled by the
defendant, and the defendant was a witness.

August 22, 1914, the defendant, the plaintiff, was charged with a conspiracy
against the defendant, and the defendant was a witness.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.
In the matter of the defendant.

January 11, 1915, the defendant was charged with a conspiracy
against the defendant, and the defendant was a witness.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.

October 11, 1915, the defendant was charged with a conspiracy
against the defendant, and the defendant was a witness.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.

January 11, 1915, the defendant was charged with a conspiracy
against the defendant, and the defendant was a witness.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.

January 11, 1915, the defendant was charged with a conspiracy
against the defendant, and the defendant was a witness.
The defendant was charged with a conspiracy against the defendant,
and the defendant was charged with a conspiracy against the defendant.

of the assignment of the trover judgment by Levinson to him he was the legal and bona fide owner of the judgment rendered against the Reywal Building Corporation; that by virtue of his status as pledgee of the Herman note and mortgage, which was the basis of the judgment in Levinson v. Reywal Building Corporation, the petitioner was the equitable owner of said judgment and in equity and good conscience was entitled to receive the proceeds of the same. As we have said, judgment was entered in accordance with the prayer of the intervening petition.

It is well settled by numerous decided cases that fraud will not be presumed but must be proved, like any other fact, by clear and convincing evidence. McKenna v. Mickelberry, 242 Ill. 117, and cases there cited.

Counsel for plaintiff make various attacks upon the bona fides of the transaction. They say that the original chattel mortgage made by Herman was fraudulent. There is no evidence that this is so, and, moreover, the judgment obtained in the trover suit by Levinson, the mortgages, based upon the validity of the Herman note and chattel mortgage, would seem to establish their genuine character.

Plaintiff argues against the validity of the loan of October 23, 1933, by Lieblich to Levinson, and the collateral agreement to secure the same pledging the Herman note and chattel mortgage. It is alleged that it is highly improbable that Lieblich, who was in the restaurant business, would make a loan to Levinson, a young Doctor. There was evidence supporting the good faith of the transaction. These parties had been acquainted for many years and Lieblich testified that Levinson had befriended and aided him during his school days. Furthermore, the check evidencing the amount of the loan was introduced in evidence. This was signed by Lieblich to the order of Levinson for \$1500 and bears Levinson's indorsement and the notation that it has been paid. Plaintiff argues as to

many minor details which he asserts indicate that the transaction was not bona fide. We do not find sufficient substantial evidence to justify the conclusion that the transaction was not in good faith, free from any fraud.

We find no reversible error in the ruling of the court in sustaining objections to questions by plaintiff's counsel. The only objection shown by the abstract to have been sustained by the court was to a question relating to certain books to be taken in the replevin suit. The objection went to the form of the question, which was subsequently rephrased and answered.

The rights of Lieblich arising out of the assignment to him of the judgment in Levinson v. Keyval Building Corporation take precedence over the rights of the plaintiff based upon service of the garnishment process. It has been held that the fact that a garnishee was not notified that the judgment had been assigned until after the service of the garnishee summons will not defeat the assignment. Williams v. West Chicago St. R.R.Co., 199 Ill. 57; Knicht v. Griffey, 161 Ill. 88; Price v. German Exchange Bank, 60 Ill.App.418; Buxbaum & Co. v. Dunham, 51 Ill. App. 240.

The trial court was justified in sustaining the intervening petitioner's claim that he was the equitable owner of the judgment against the Building Corporation and that its assignment to him was valid. We would not be justified in disturbing the conclusion of the court, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

37654

OSWALD W. KOEHLER,
Appellant,

vs.

MID-CITY TRUST AND SAVINGS BANK
OF CHICAGO, a banking corporation,
and MID-CITY NATIONAL BANK OF
CHICAGO, a banking corporation,
Appellees.

APPEAL FROM HUSBAND
COURT OF COOK COUNTY.

279 I.A. 616²

MR. JUSTICE MCNULTY DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill seeking an accounting of certain notarial fees and for an order on defendants to pay the same to him. Defendants respectively filed general and special demurrers; the trial court overruled the demurrers of the Mid-City Trust and Savings Bank and ruled it to answer; the demurrers of the Mid-City National Bank were sustained and the bill as to it was dismissed for want of equity. Complainant appeals from this latter order.

The bill alleges that he was a duly appointed and qualified notary public in Cook county, Illinois, and entitled to the fees of such office; that the Savings Bank was an Illinois corporation, and the National Bank a national banking corporation, both doing business in Chicago; that the Savings Bank received from its correspondents commercial paper for presentation to various parties for payment or protest; that from April 1, 1926, to March 30, 1933, complainant was selected by the Savings Bank as a notary public for protesting such commercial paper as required protesting and that as such notary public he made such protests, which work took part of his time, the bank furnishing him desk room without charge; that complainant kept no itemized record of charges for such notarial services and that the same were retained by the Savings Bank, which now has possession of such records; that both defendants have refused to deliver said records to the complainant.

That on or about May 8, 1933, by a written agreement the

National Bank took over all the assets of the Savings Bank of every kind and also the quarters formerly occupied by the Savings Bank; that said contract between the banks contained, among other things, the following provisions:

"B. Purchaser agrees:

1. To and does hereby guarantee to pay, in accordance with the terms thereof, all of the liabilities of the Seller of every kind, nature and description, including all liabilities growing out of any trust relationships assumed by Seller as a result of the operation of its trust department, but excluding its liabilities to its stockholders as such."

That by this agreement the National Bank assumed the indebtedness of the Savings Bank, including complainant's claim for notary fees.

That without reference to the records complainant is unable to state the specific number of items protected by him and the specific amount of fees due him or the amounts to be credited to the Savings Bank; that the Savings Bank has never paid complainant any of the notarial fees collected by it for him, and that approximately \$10,000 is due him from defendants for such fees.

That complainant has demanded from defendants his notarial records and accounts, which have been refused, and complainant has been refused inspection of such accounts and records.

The bill prayed for an accounting and an order on defendants to pay complainant such sums as may be found due him.

The trial court evidently was of the opinion that the bill stated a good case as to the Savings Bank, and that bank has not appealed from the order overruling its demurrer. The only question then presented is the propriety of the order sustaining the demurrers of the National Bank.

The theory of the bill is based upon the opinion in Pitcair v. Continental Bank, 308 Ill. 265, where it was held that a notary employed by a bank to protest its commercial paper is entitled to

National Bank took over all the assets of the Savings Bank of New York and also the charter formerly possessed by the Savings Bank; that said contract between the banks contained, among other things, the following provisions:

"3. Further agreed:
1. To and from henceforth to pay, in accordance with the terms thereof, all of the liabilities of the Bank of New York, including all liabilities growing out of any and all contracts entered into by the Bank of New York prior to the date of the operation of the present agreement, and including the liabilities to the extent of the assets."

That by this agreement the National Bank assumed the liabilities of the Savings Bank, including the assets of the Savings Bank.

That certain reference to the transfer of assets in making to state the assets of the National Bank as being the assets of the Savings Bank; that the Savings Bank has never paid or received any of the National Bank's assets; that the National Bank has never received any of the Savings Bank's assets; that the National Bank has never received any of the Savings Bank's assets.

That certain reference to the transfer of assets in making to state the assets of the National Bank as being the assets of the Savings Bank; that the Savings Bank has never paid or received any of the National Bank's assets; that the National Bank has never received any of the Savings Bank's assets.

The bill prayed for an accounting and an order to deliver to the payee of the bill the sum of \$100,000.

The trial court granted the bill and the defendant appealed from the order granting the bill. The bill was then presented to the court and the court granted the bill. The bill was then presented to the court and the court granted the bill.

The court of the bill is based upon the opinion in Y. v. National Bank, 200 N.Y. 200, where it was held that a bill is not a bill to transfer the assets of the National Bank to the Savings Bank.

all the fees as notary public in that connection.

The National Bank in this court first contends that the bill does not show the statutory steps whereby complainant became a duly qualified and acting notary public entitled to collect fees pursuant to the statute. There is no merit in this point. The bill alleged that he was a duly appointed, qualified and acting notary public. To have pleaded the steps which resulted in his appointment would be to have pleaded the evidence. In People v. Beveridge, 313 Ill. 456, cited by the defendant National Bank, it was contended that an answer sworn to by a notary public was invalid because the notary had not registered his notary certificate with the County court. The court held that a person acting as a notary under color of authority will be held to be a notary *de facto*. In McCormick v. Higgins, 180 Ill. App. 341, an affidavit was attacked on the ground that the notary taking such affidavit had not filed the certificate of his appointment in the office of the county clerk. The opinion holds that it does not follow that his acts shall be void because of this failure. We held that the allegation of complainant that he was a duly appointed notary public was a statement of fact and not a conclusion of law.

We do not see upon what theory defendant National Bank can escape the explicit language contained in the agreement whereby it acquired the assets of the Savings Bank and agreed to pay "all of the liabilities of the Seller of every kind, nature and description," excepting only the Seller's liabilities to its stockholders. As we have said, under the decision in Pitch v. Continental Bank, *supra*, the notary public protesting commercial paper for the bank is entitled to all of the notary fees. Complainant alleges that the Savings Bank, for which he acted as notary public, has retained and kept all such fees. There can be no doubt but that it was obligated to turn them over to complainant and he was entitled to

recover them, or at least a part of them, in this action, which is essentially an action for money had and received by the Savings Bank for his use. This obligation was a liability of the Savings Bank which the National Bank agreed to pay. In Behfield v. State Nat'l Bank, 97 Fed. 282, the court held that a contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture, lease and cash assets is not ultra vires, but is within its powers conferred by statute to conduct a general banking business. It should not require argument to support the conclusion that when a bank takes over the entire assets of an old corporation its assets are impressed with a trust in favor of its creditors, and where, as here, there was an express agreement for the purchasing bank (the National) to assume the liabilities of the selling bank (the Savings), this includes the liability of the latter bank to the complainant for notary fees earned by him and collected by the Savings Bank and retained by it.

Complainant is not estopped from asserting his claim against the National Bank. Cases cited which have been held to present an equitable estoppel involve some conduct on the part of the complainant which amounted to a participation in the transactions. Such a case is Chicago Title & Trust Co. v. Prodergast, 335 Ill. 616, where complainant was held estopped to question a master's sale from the fact that he was actually present at the sale and participated therein. And again, in Bondy v. Samuels, 333 Ill. 535, cited by the defendant, it was held that complainant would be estopped where by his statements and conduct he leads another to do something he would not have done but for such statements and conduct. In the case at bar nothing that complainant did or did not do had any connection with or relation to the transfer of the assets of the Savings Bank to the National Bank. As far as the bill discloses

... however, that, as at least a part of them, in this action, which is
essentially an action for money paid and received by the savings
bank for his son. This litigation was a litigation of the savings
bank which was judicially brought to rest. In McDonald v. McDonald
1881, 100 N.Y. 401, the court said a contract is a
contract that is entered into by the institution of business and in
connection of the transfer of it by the other bank of the other
institution, it was and each bank is not liable. But in McDonald
the court decided by statute to decide a contract between bank
and bank. It would not require argument to support the conclusion
that when a bank takes over the entire assets of another bank
the assets are transferred with a fund in favor of the creditors,
and hence, the assets are not subject to the claims of the bank
which took (the National) to receive the assets of the other
bank (the savings), this includes the liability of the latter
bank to the shareholders for money loaned by them and collected
by the savings bank and retained by it.
... Company is not concerned with receiving the claim made
the National Bank. These claims have been paid to present on
application returned to the bank on the part of the company
and which amounted to a contribution to the shareholders. Such a
claim is McDonald v. McDonald, 100 N.Y. 401.
This conclusion was well reached by reasoning a contract with
from the fact that it was not a contract of the bank and savings
bank. McDonald v. McDonald, 100 N.Y. 401, which
by the National, it was held that shareholders would be entitled
where by his interests and without he took account to be satisfied
he would not have been any less a shareholder. In the
case of the savings bank shareholders and the bank of the
savings bank is retained in the hands of the bank of the
savings bank as the National Bank. In fact as the bill allowed

complainant had no knowledge that such a transfer was contemplated and knew nothing of it until it was completed.

Defendant argues that complainant is guilty of laches in filing his bill. March 30, 1933, was the termination of the seven year period in which complainant performed notarial services for the Savings Bank; May 3, 1933, the transfer of the assets of the Savings Bank to the National Bank occurred; the bill of complaint was filed June 22, 1933. The special demurrer alleges, among other things, that if complainant ever had any claims or demands against defendants, "the same or some part thereof have accrued more than five years prior to the filing of said bill." This is in effect a plea of the statute of limitations. Chap. 83, sec. 16, Illinois Statutes (Cahill) which says that such civil actions must be commenced within five years next after the cause of action accrued. This demurrer went only to the first two years of the period covered by complainant's bill and in effect admits that liability, if any, can be for the fees accruing during the five years next prior to the filing of the bill.

In Evans v. Moore, 347 Ill. 60, it was said that courts of equity adopt the limitation provided by statute for analogous remedies at law as fixing the period beyond which any delay requires explanation. Manson v. Harrison, 386 Ill. 30, repeated the ancient axiom that "equity follows the law" and held that only when the delay renders it inequitable will laches bar the right within the statutory limitation.

We do not see how the portion of complainant's claim arising during the five years just prior to filing the bill would be barred by any statute of limitations. Moreover, the National Bank took over all the assets, records, and place of business of the Savings Bank, thus practically putting it out of business and leaving nothing to pay its creditors. An examination of the

and have nothing at all with it and consider it

All material to Wilson of June 1949 and 1950 reports destroyed.

will be maintained and use, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2

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[illegible]

DATE 7-11-60 ; SUBJECTS: MURDER OF MARTIN LUTHER KING, JR.

[illegible][illegible]

1. The first group of variables includes the variables that are used in the first stage of the analysis. These variables are the variables that are used to explain the dependent variable in the first stage of the analysis.

[Faint, illegible handwritten notes]

1990-1991

Source and title: 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-268

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See the at line 110 of "Continuation of Income Tax Return" and to page

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As I have said, there are no other copies of the letter.

ATTENDING PHYSICIAN HAS BEEN ADVISED THAT THE PATIENT IS NOT IMPROVING AT

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(continued)

100-443887-1000

1. The first group of people who are not allowed to enter the country are those who are considered to be a threat to national security. This includes anyone who is involved in espionage, terrorism, or other activities that could harm the country's interests.

1950-1951

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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To speak of the world as a whole, it is not the same as to say that all

10-11-68

and is intended to be used in the same manner as the

books of the Savings Bank would have shown, as the bill alleges, that the notary fees earned by complainant were retained by the Savings Bank. Under the decision in the Pitman case, the bank had no legal right to do this. The National Bank must be presumed to know that these fees were unlawfully retained by the Savings Bank, which was obligated to pay them to complainant. It must be presumed that the National Bank agreed to pay the liabilities of the Savings Bank with knowledge of this obligation. In the light of these facts no equitable considerations appear which would bar complainant's right to recover against the National Bank.

It was error to sustain the demurrers of the National Bank, as the bill states a case for complainant against both defendants.

The decree dismissing the bill is reversed and the cause is remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

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It was noted on examining the contents of the evidence bag, as the fill noted a more typical composition than the other two. The material filling the fill is composed of the same material as the other two, but is of a different color.

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37750

ALBERT O. SMITH,
Appellant,

vs.

ORRA GREENBAUM,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 616³

MR. JUSTICE ROSENBERG DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill to restrain the collection of a note executed by him and held by defendant; answer was filed; defendant also filed a cross-bill asking for judgment on the note; complainant answered this; a decree was entered dismissing complainant's bill for want of equity and granting the prayer of the cross-bill, holding that defendant recover from complainant \$2368.78 with interest. Complainant appeals.

The controversy arises out of the sale to complainant of a Perpetual Membership in the Madison Athletic Club of Chicago formerly in the name of Alexander L. Greenbaum who had died leaving his widow, the defendant, holder of this membership, which she desired to sell.

The Madison Athletic Club, originally a defendant, was defaulted and shortly thereafter went into bankruptcy and the parties were restrained from further proceeding against it.

The bill alleges that complainant was induced to buy this Perpetual Membership by misrepresentations made to him by one of the officers of the club as to its financial condition; that the club was defendant's agent in the transaction and responsible for these misrepresentations.

Defendant's cross-bill alleged that she was the widow of Alexander L. Greenbaum; that on November 10, 1930, she received from the Madison Athletic Club a note for \$2368.78 signed by complainant, which was tendered and accepted by her in payment of the Perpetual Membership in the club owned by her deceased husband, said

membership having been sold by the club to complainant; that on or about December 9, 1930, she received from complainant \$1250, the payment of the first installment on the note. She alleges that the whole of the note is now due and unpaid and asks the court that complainant be required to pay the amount due thereon.

The cause was referred to a master in chancery to take evidence and report. The master found that the material allegations of the bill of complaint were proven, that the cross-bill was without equity, and recommended a decree in accordance with these findings.

A preliminary point of practice arises with relation to orders upon the master's report.

November 15, 1933, the chancellor on an ex parte hearing overruled the defendant's exceptions to the master's report and entered an order approving the report. The last day of the term was November 15th. Thereafter, on December 7th, the court entered an order vacating the order of November 15th approving the report, and the matter was set down for further hearing. January 4, 1934, the court sustained the exceptions to the report and entered a decree accordingly.

Complainant argues that the order of November 15th overruling the exceptions and approving the master's report is a final order which cannot be vacated after term, citing Barnes v. Barnhart, 236 Ill. 604. That case, however, is not in point. It involved a partition suit and the order held to be final was one approving the master's report of sale under a prior decree entered by consent.

The master's report possesses no elements of a judgment. It is merely advisory. An order approving it is merely interlocutory and subject to revision. The court has power to accept or reject the report at any time until there has been a final decree.

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Simons v. Morris, 323 Ill. 199; Adkins v. Kent, 85 Mo. 623; Filman v. Theraison, 65 Maine 95; Kingsbury v. Kingsbury, 30 Mich. 213.

The evidence shows that in September, 1930, defendant telephoned the club asking about the Perpetual Membership of her husband who had died a few months before. She was told that it was customary for the club to take over the membership in case of the death of a member; that the widow would be taken care of. She subsequently learned that the man with whom she talked over the telephone was Mr. Crippen, an officer of the club. She heard nothing further from the club until the latter part of November, 1930, when Crippen handed her complainant's note for \$2200, telling her that the note had been given to the club for a membership and that it had in turn been sent to her by the club and given to her for her husband's membership. About December 8th she received through the mail complainant's check for \$220, representing the first installment on the note of complainant, together with a letter to this effect. When the second installment of \$220 came due she telephoned complainant asking for a remittance and was told by complainant that he did not intend to pay as he had lost quite a sum of money, and also because the conditions under which he had purchased the membership had been misrepresented to him by the club.

Complainant's testimony is that he was a resident member of the club; that he received a letter from Crippen dated October 17, 1930, stating that "A death has occurred among 'The 500' - Our Perpetual Membership Roster;" that the membership was free from dues, taxes and assessments; that he was invited to fill the vacancy; the letter said "This roster has been closed for nearly two years"; that the resident membership of complainant could be applied toward the purchase of the Perpetual membership and terms to suit complainant's convenience arranged. Complainant testified that he attended a meeting of the officers of the club October

and
 22nd/was again invited by Mr. Crippen of the membership committee to become a member of the "Five Hundred Club." He was told by Crippen that the club was in a sound financial condition, that every department showed a profit and that he knew of no investment that would earn as large a return as this Perpetual Membership.

Thereupon complainant signed an application addressed to the Medinah Athletic Club wherein he made application for Perpetual Membership in the club, agreeing to pay therefor \$3600. On the same date he gave his check for \$400 and turned in his resident membership at \$1000 and gave his note wherein he promised to pay to the order of the Medinah Athletic Club \$3200 in monthly installments of \$260 each.

Some days after signing and delivery of this note to the club, complainant at Crippen's request, changed the payee of the note from Medinah Athletic Club to Mrs. Alexander L. Greenbaum, the defendant. This is the note that Crippen subsequently delivered to defendant. Up to the time that complainant was asked to change the name of the payee in the note complainant did not know of Mrs. Greenbaum. Several days after this, pursuant to a letter, complainant attended a meeting of the club on November 18th; he then learned that 496 Perpetual Memberships, and not 500, had been sold; that several of the departments of the club were not making money; that the club was in debt on the bonds floated to build the new club house.

November 21st complainant wrote to the club, returning his Perpetual Membership card, and stating that on account of financial reverses he could not make the payments on the note given in payment of the Perpetual Membership. He asked for the return of the \$400 paid and the return of his note. To this Mr. Nyfe, chairman of the membership committee, replied that it was impossible to retract the membership transaction as the note had been turned over to the

defendant, Mrs. Greenbaum, and complainant's resident membership transferred to another. Complainant then had a conference with Fyfe and Grippen, at which complainant charged Grippen with misrepresenting as to the financial condition of the club. He testified that he did not charge Grippen with fraud. At this conference it was agreed that Fyfe would undertake to sell the Perpetual Membership for complainant, who agreed to pay the December installment on the note sold by Mrs. Greenbaum provided his Perpetual Membership had not been sold by that time. As we have said, the December installment was paid, but the installment falling due in January was not paid.

There is no particular conflict as to the facts. The question is largely one of law. There is also very little dispute as to the law. The question is as to the applicability of the law to the facts.

Complainant argues that the club was the agent, representing defendant in the sale of her husband's Perpetual Membership to him. The chancellor was of the opinion that the Club bought the membership from defendant and sold it to complainant. Under the constitution and by-laws of the club, art. 3, sec. 3, the club had the right to purchase the membership. At this time there were three or four vacancies in the Perpetual Membership roster. The club sold complainant a Perpetual Membership for \$3600, accepting in payment his resident membership at \$1000, his check for \$400 and note for \$2200 payable to the club. Complainant's resident membership was then transferred by the club to another. Three or four days later the club requested complainant to change the name of the payee in his note from the Madison Athletic Club to the defendant. It also should be noted that while the club received \$3600 for the Greenbaum membership, defendant received only \$2200. This is inconsistent with agency of the club; if it were her agent it should have accounted

to her for the entire proceeds of the sale. There is strong support for the conclusion that the club was merely an intermediary through which defendant received complainant's note.

The rule authorizing the rescission of a contract on account of fraudulent misrepresentations is well established. There must be a false statement of a material fact, known or believed by the party making it to be untrue. It must be made for the purpose of inducing action by the other party, and the party seeking rescission must believe the representation to be true and rely upon it to his injury. Front v. Roy Oil Co., 263 Ill. 34; Aranekowski v. Knapp, 268 Ill. 183.

It is not clear that the representations were knowingly false and that complainant relied upon them in purchasing the Perpetual Membership. The particular statement said to be a misrepresentation was that the club was in a sound financial condition, every department showing a profit. The balance sheet of the club, introduced in evidence, shows that every department was making a profit except a few like the barber shop, magazines, billiard room and telephone; that the loss from these departments was \$11,000 per annum as against a profit of \$236,588 per annum from the other departments.

Complainant argues that it was false to state that the roster of 500 Perpetual Memberships was closed. The record does not show the number of Perpetual Memberships on October 17th, when the statement was made, but it does appear that on November 27th there were only four out of the five hundred undisposed of. Complainant testified he did not buy the Perpetual Membership because he was told the Five Hundred roster was full.

The language used by Crippen may reasonably be characterized as "puffing statements," being merely his opinion of value and as to advantages to be derived by complainant in transferring his membership from the resident membership class to the Perpetual Membership

to her for the safety of the child. There is strong evidence for the conclusion that the child was severely and irreversibly injured which defendant received knowledge of at the time.

The fact that the defendant was conscious of a condition on the part of the child at the time of the injury is well established. There must be a false statement of a material fact, known or believed by the party making it to be untrue. It must be made for the purpose of inducing action by the other party, and the party receiving the statement must believe the representation to be true and rely upon it to his injury. People v. New York, 202 N.Y. 21; People v. ...

People v. ...

It is not alone that the representations were knowingly false and that defendant relied upon them in purchasing the ... The particular statement said to be a ... was that the child was in a sound physical condition, every department showing a profit. The balance sheet of the child, ... in evidence, shows that every department was making a profit except a few like the ... department, ...

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class.

Complainant testified to the effect that what moved him to the purchase of the Perpetual Membership was his opinion that it would be an excellent investment. "I bought it purely for investment," - and that one of the reasons in making the purchase was the expectation that the Perpetual Membership would greatly increase in value. It is difficult to escape the conclusion that complainant was induced, by the easy terms and his hope of profits in the future, to purchase the Perpetual Membership.

Even if the foregoing reasons are not wholly conclusive, we are of the opinion the fact that complainant ratified the purchase of the Greenbaum membership is sufficient to deny him the right to rescind the transaction. November 27th, after full knowledge that all of the Perpetual Memberships had not been sold, that several departments of the club were not making money, and that the financial condition was unsound, the complainant made a new agreement with Tyfe, chairman of the membership committee, whereby Tyfe agreed to resell complainant's membership if complainant would pay the first installment on his note in the hands of the defendant. This agreement operated as a waiver of any fraud and as an abandonment of any claim to equitable relief.

In Hagers v. Higgins, 57 Ill. 244, the complainant had knowledge of the fraud which she claimed but made a new contract to dispose of her interest. The court held that where a party has knowledge that he has been defrauded but subsequently confirms the original contract by making new agreements respecting it, he thereby waives the fraud and abandons his claim to equitable relief. A party defrauded cannot be allowed to deal with the subject matter of a contract and afterward rescind. See also Brown v. Brown, 142 Ill. 409; Donian v. Fox, 170 Ill. App. 41. Pursuant to this agreement with Tyfe to dispose of complainant's Perpetual Membership complainant remitted to defendant his check for \$220, accom-

Commissioner notified on the 11th that they had an
the purpose of the proposed amendment was his opinion that it
would be an excellent investment. "I thought it fairly for invest-
ment," and that one of the reasons in making the purchase was
the expectation that the proposed amendment would result in
more in value. It is difficult to say how the Commission had
Commission was advised, by the way, that his hope of getting
in the future, in person, the proposed amendment.
From it the following persons are not really convinced,
we are of the belief that the Commission's position is not
based on the Commission's membership is sufficient to show that the
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that the proposed amendment was not, the Commission made a
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and would pay the first installment on his part in the hands of the
Commission. The agreement is made as a matter of fact, and
as an agreement of my office to receive it.

In ROBERT A. BROWN, NY 111, 111, the Commission had
knowledge of the kind which was obtained and made a new contract
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knowledge that he has been informed and subsequently notified the
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by making the first and showing his claim as a result of it. A
party notified cannot be allowed to deal with the subject matter
of a contract and otherwise proceed. See also ROBERT A. BROWN,
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passed by a letter in which he says that this is for the first installment on the note given in payment "of Perpetual Membership in Medinah Athletic Club which was recently purchased by me." This was an acknowledgment and recognition of the validity of the sale, made after complainant had full knowledge of the financial condition of the club.

A final consideration which is conclusive against complainant is that defendant became a holder in due course of the note, free from any defenses to it, when she accepted it from the club without knowledge of any fraud which the club may have practiced to induce complainant to make the note and to subsequently make defendant the payee. Drum Construction Co. v. Forbes, 305 Ill.303, is in point. In that case Forbes lent Lamberton some money, receiving Lamberton's note for \$950 secured by a chattel mortgage; when the note fell due Forbes called on Lamberton, who told him he would get a check from the Drum Construction company to pay Forbes in full; Lamberton then falsely represented to Drum, president of the company, that he could secure a used automobile from Forbes for \$950; Drum agreeing to this gave Lamberton a check for \$950 signed by the Drum company payable to the order of Forbes; Lamberton gave the check to Forbes, receiving his note and chattel mortgage; Forbes cashed the check but Drum never received the automobile; the Drum Construction company sued Forbes to recover the amount collected by him on the check. The Supreme court held that plaintiff could not recover, saying that when Forbes received the check from Lamberton there was nothing in the character of the instrument to charge him with knowledge of any infirmity or to put him on inquiry; that Forbes became the holder of the check in good faith and for value and therefore it was not subject to any of the defenses claimed by the Drum Construction company, the maker of the check.

passed by a letter in which he says that this is the first in-
sultant on the part given in regard to the National Association in
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was an acknowledgment of a recognition of the validity of the case,
and after several months had been passed at the National Association
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A final acknowledgment which is conclusive against complaint
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at the time.

Substituting complainant Smith for Drums, the Medinah Club for Lamberth, Mrs. Greenbaum for Forbes, and a note instead of a check, and applying the holding in that case, the conclusion is clear that when defendant received complainant's note payable to her she received it as a complete instrument, free from any defenses arising out of any infirmity in the making of the note. She never knew the complainant before she received the note and knew nothing of any representations which the club might have made to complainant. The note was a negotiable instrument, complying with all the requirements of section 52 of the Negotiable Instruments act, chap. 98, Illinois Statutes (Cahill) and was delivered to defendant before maturity. She is a holder in due course for value against whom no personal defense, such as the defense of fraud in procuring it, could be successfully asserted.

The chancellor's decree is clearly sustained by the evidence and is according to law, and it is therefore affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

Hatchett, J., dissents/

37812

BANKERS TRUST COMPANY, a foreign corporation, as Trustee under a Trust Agreement dated March 25, 1939,

Appellee,

vs.

JENNIE J. JOHNSON, FRANK O. JOHNSON
and THELMA V. JOHNSON,

Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

279 I.A. 616⁴

MR. JUSTICE McGUIRE DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill to foreclose a deed of trust; answers were filed, the cause referred to a master in chancery who heard evidence and made a report recommending a decree in accordance with the prayer of the bill; exceptions to the report were overruled and a decree entered, from which defendants appeal.

The first point made by the defendants challenges the trust deed on the alleged ground that the acknowledgment was taken before a notary public who was an officer of the bank which made the mortgage. There is no proof that the notary public was an officer or stockholder in the bank. He testified he was a clerk in the real estate loan department of the bank. No case is cited, and we doubt if one could be cited, holding that an acknowledgment by a clerk not beneficially interested in the instrument is invalid.

It is next asserted that there is no competent evidence that defendants executed the promissory notes or coupons in question. There was ample evidence to this effect. One witness testified he was familiar with the signatures of the defendants and that each of the notes bore their signatures. Defendants did not deny this testimony. Moreover, complainant makes a prima facie case in a foreclosure proceeding by introducing the trust deed and notes, Foreman v. Cohn, 348 Ill. 290, and proof of execution of the notes is not necessary in the absence of a sworn answer denying their execution. Dean v. Ford, 180 Ill. 309.

It is next said to have been error to admit in evidence

HABITUAL DRUG USER, a foreign subject,
residing at 1234 Main Street, New York,
New York 10001.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THOMAS E. SWANSON, JR.,
and
JOHN V. SWANSON,
Defendants.

10001 N.Y.C.

Attorneys.

THE COURT HEREBY RECOMMENDS THAT THE DEFENDANTS

BE CONFINED TO THE CITY OF NEW YORK AND TO THE

COUNTY OF NEW YORK, AND THAT THEY BE KEPT UNDER

THE CLOSEST SUPERVISION OF THE OFFICIALS OF THE

DEPARTMENT OF CORRECTIONS, AND THAT THEY BE

PROHIBITED FROM LEAVING THE CITY OF NEW YORK

WITHOUT THE PERMISSION OF THE OFFICIALS OF THE

DEPARTMENT OF CORRECTIONS, AND THAT THEY BE

PROHIBITED FROM ASSOCIATING WITH ANY PERSON

WHO IS KNOWN TO BE A DRUG USER, AND THAT

THEY BE PROHIBITED FROM FREQUENTING ANY

PLACE WHERE DRUGS ARE USED, AND THAT THEY

BE PROHIBITED FROM FREQUENTING ANY

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THEY BE PROHIBITED FROM FREQUENTING ANY

the application for the loan and a supplement thereto because these documents were not set up in the bill. We do not think the point is important as no prejudice could result from their introduction. Jennie T. Johnson testified that she did not sign any paper authorizing the bank to hold money for the payment of taxes and these documents were competent to impeach this testimony.

Defendants raise the question of consideration for the mortgage. The record shows that the entire proceeds of the loan were used to pay prior mortgages, taxes and expenses.

It is suggested that complainant waived the option to accelerate the maturity of the loan, citing a case where it was held that acceleration must be timely exercised upon the occurrence of the default. Trinity County Bank v. Haag, 151 Cal. 363. But in the instant case new defaults occurred every six months. The exercise of the option to accelerate the maturity was timely.

Defendants next say that there is no proof that the mortgagors, Jennie J., and Frans O. Johnson, had title to the premises at the date of the trust deed. In Wahl v. Seelack, 77 Ill. App. 286, a similar point was made and the court held that this could not avail the defendants; that all that was sought by the bill was to subject to the payment of the indebtedness "whatever title the mortgagors had, and the extent of that title is not here open to inquiry *."

Moreover, defendant Thelmer V. Johnson testified that he was the present holder and took title subject to unpaid taxes and the mortgage and foreclosure.

Defendants seem to argue that because no money physically came into their hands out of the proceeds of the loan, the trust deed is not a lien against the property. The statement of the argument refutes itself.

Some complaint is made as to an item of \$652.35 appearing

In the master's report which it is said should not be charged to the defendants. The record shows that of this amount \$104 was used to pay insurance premiums on the property and defendants were given credit for the balance as shown in the master's statement of account.

Other points are made which are not of substantial importance.

The decree has been entered, sale has been had and the period of redemption is running. At the conclusion of the brief for complainant counsel says, "From the most charitable viewpoint which we can assume, we are wholly unable to understand the reason for this appeal." This expresses our own thought.

The decree is affirmed.

AFFIRMED.

O'Connor, F. J., and Hatchett, J., concur.

37836

TRUST COMPANY OF CHICAGO, a Corporation,
Administrator of the Estate of RUSH F.
VASE, Deceased,

Appellee,

vs.

EDWARD M. CRAIG,

Appellant.

APPEAL FROM JUDICIAL
COURT OF CHICAGO.

279 I.A. 617¹

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

Rush F. Vase brought a suit against defendant claiming a balance due of \$19,400 on account of his written contract with defendant. The jury returned a verdict for plaintiff for \$12,000; defendant appeals from the judgment thereon.

After suit was commenced but before trial plaintiff died and the Trust Company of Chicago was duly appointed administrator of his estate. The death of the plaintiff was suggested and the substitution of the administrator was made. The clerk of the court, in recording the name of the administrator, by error wrote the name "The Chicago Trust Company." Upon the trial the plaintiff introduced a certified copy of the letters of administration granted to The Trust Company of Chicago. However, in writing up the judgment the clerk again erroneously entered the name of the plaintiff's administrator as "The Chicago Trust Company."

Defendant in this court argues that the judgment in favor of "The Chicago Trust Company" is irregular and void, as the proof shows that "The Trust Company of Chicago" was the administrator. A mistake in the name of the administrator is not grounds for reversal. Sec. 6, chap. 7, Illinois Statutes (Cahill) provides that no judgment shall be arrested or reversed for error in a name where the correct name appears once in the proceedings. The copy of the letters of administration introduced in evidence is part of the proceedings and these show correctly the name of the adminis-

1712

THE CHICAGO TRUST COMPANY, a corporation,
Administrator of the Estate of JOHN E.
WILLIAMS, deceased.

Plaintiff

vs.

EDWARD A. WILLIAMS,

Defendant.

279 I.A. 612

IN SENATE, JANUARY TWENTY-NINE, 1912.

EDWARD A. WILLIAMS, a citizen of the State of Illinois,

vs.

THE CHICAGO TRUST COMPANY, a corporation, and JOHN E. WILLIAMS, deceased.

Plaintiff

vs.

EDWARD A. WILLIAMS, a citizen of the State of Illinois,

vs.

THE CHICAGO TRUST COMPANY, a corporation, and JOHN E. WILLIAMS, deceased.

Plaintiff

vs.

EDWARD A. WILLIAMS, a citizen of the State of Illinois,

vs.

THE CHICAGO TRUST COMPANY, a corporation, and JOHN E. WILLIAMS, deceased.

Plaintiff

vs.

EDWARD A. WILLIAMS, a citizen of the State of Illinois,

vs.

THE CHICAGO TRUST COMPANY, a corporation, and JOHN E. WILLIAMS, deceased.

Plaintiff

vs.

EDWARD A. WILLIAMS, a citizen of the State of Illinois,

vs.

THE CHICAGO TRUST COMPANY, a corporation, and JOHN E. WILLIAMS, deceased.

trator. Moreover, by order of court all the records in the case were corrected so as to name the plaintiff as The Trust Company of Chicago, administrator of the estate of Rush F. Vase, deceased.

Plaintiff claims that under his contract with defendant he sold defendant an interest in a patent for the sum of \$25,000, on which there is \$19,400 still due and unpaid. Defendant replies that under the terms of the contract defendant was to pay the balance of the purchase price for an interest in the patent out of the profits of the corporation, and also that plaintiff has breached the contract by failing to assign his interest in the patent to the corporation mentioned in the agreement.

Upon the trial the construction of the contract was submitted to the jury. This was error. Where there is no ambiguity in a contract its interpretation and the rights and liabilities of the parties under it are matters of law resting exclusively in the court. Garstang Packing Co. v. Sterne & Sons Co., 286 Ill. 355; Dunn v. Eriehfield, 214 Ill. 292.

Although it was error to submit the contract in question to the jury for construction, yet if its construction was correct we would not be disposed to reverse for this reason, as counsel for defendant did not object but seemingly acquiesced in the submission to the jury.

We must therefore consider the entire contract, which is as follows:

"THIS AGREEMENT, made this the 7th day of January A.D. 1931, by and between Rush F. Vase of Chicago, County of Cook and State of Illinois, hereinafter called the VENDOR and Edward M. Craig of Chicago, County of Cook and State of Illinois, hereinafter called the VENDEE:

WITNESSETH: WHEREAS THE VENDOR is now the sole owner of the patent and all rights and interests thereunder for a new and useful improvement in 'Expansion Plugs' originally issued to Eldridge H. Morton of Chicago, Illinois, by the United States and numbered 1,587,317 and bearing date of June A.D. 1926, and whereas the VENDEE is desirous of acquiring an interest in the said invention. NOW, IN CONSIDERATION of the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000)

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

[illegible]

The committee by failing to make his interest in the subject of the
the question of the organization, and also that it was decided
more of the business plan was presented in the subject of the

When the trial was completed at the court house in
the city. This was about 1900. There were no witnesses in the
court room. The judge had no idea who the witness was.
The name of the witness was not known to the court.

[illegible][illegible]

TO THE DIRECTOR, FBI, WASHINGTON, D. C.

1. The first of these is the fact that the United States has a large and growing population of people who are not citizens of the United States. This is a result of the large number of people who have been admitted to the United States as permanent residents, but who have not yet become citizens. This is a problem because these people are not entitled to the same rights as citizens, and they are not subject to the same responsibilities. This is a problem because these people are not entitled to the same rights as citizens, and they are not subject to the same responsibilities.

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the VENDOR agrees to sell absolutely, to said VENDEE, FIFTY-TWO per cent (52%) in the said invention with all the rights, title and interest, royalties, privileges and powers belonging or appertaining thereto.

IT IS AGREED that upon the signing of this agreement which hereinafter acknowledges obligation and agrees to and outlines the arrangement of payment by the VENDOR, the VENDOR agrees to execute an effectual assignment of FIFTY-TWO (52%) per cent interest in the patent as outlined above.

IT IS AGREED AND UNDERSTOOD by the VENDOR and VENDEE that a corporation is to be formed and that the VENDOR and VENDEE shall each execute an effectual assignment of his entire interest in the patent to the corporation and receive therefor stock in the same corporation in prorate value of his interest. The proposed name of the corporation is 'Horton Wooden Expansion Plug Co.'

PAYMENT by the VENDEE to the VENDOR is to be met as follows: THIRTY-FIVE HUNDRED (\$3,500) dollars in cash on date of this contract together with two notes for ONE THOUSAND (\$1,000) dollars each bearing same date, first note payable sixty days from date, second note payable one hundred and twenty days from date.

THE VENDEE agrees to advance funds to meet payment on order for 500,000 sets of Horton Wooden Expansion Plugs, as per contract of VENDOR with Eldridge H. Horton of Amelia, Va.

Shipment to be made as follows: 100,000 sets of plugs shipped during the month of February, and 50,000 each month thereafter until the total amount has been shipped. Shipments are to be made with invoices which shall bear dating of not less than thirty days from receipt of goods. The cost agreed on this order is to be twelve dollars (\$12.00) per thousand. This cost is to be entered on the books of the corporation as cost to it and credited to the VENDEE'S personal account.

THE VENDEE agrees to advance moneys for the current expenses of the functioning of the corporation, in maintaining a representative office, advertising, and salaries to salesmen, same to be charged the corporation and credited to the VENDEE.

To further liquidate the obligation the VENDEE agrees to let all returning principal, together with all profits creditable to him remain intact, and pay the same over to the VENDOR until the balance has been cleared.

IN TESTIMONY WHEREOF, We have hereunto set our hands and seal this 7th day of January A.D. 1931.

WITNESS: Rush F. Vass (SEAL)
E. M. Craig (SEAL)
A. V. Howe." Edward M. Craig."

From its consideration we are of the opinion that the defendant's interpretation of the contract must be sustained.

Examining the contract as a whole, which we must do to arrive at its meaning, it will be noted that while the vendor, Vass, for a consideration of \$25,000 agrees to sell to the vendee, the defendant, 52 per cent interest in the patent for the "expansion plugs," there is no unconditional agreement of the vendee to pay this amount for this interest.

The third clause refers to the provision, "which herein-

after acknowledges obligation and agrees to and outlines the arrangement of payment by the vendee." This clearly indicates that we must look farther into the contract to ascertain what "the arrangement of payment by the vendee" may be.

It is next provided that a corporation is to be formed, to which both the vendor and the vendee shall assign respectively his entire interest in the patent, receiving stock therefor.

The next provision "outlines the arrangement" whereby the vendee is to pay the vendor for the interest in the patent. It says this payment "is to be paid as follows." There is to be a \$3500 payment in cash and two notes for \$1000 each, payable 60 and 120 days from date. The vendee then agrees to advance funds to meet expenses on an order of \$50,000 sets of expansion plugs as per a pending contract of the vendor. The cost of this order was agreed upon and it was agreed this cost was to be entered on the books of the corporation and credited to the vendee's personal account.

The vendee also agrees to advance money for current expenses of the corporation, including office rent, advertising and salaries, and these amounts are to be credited to the vendee.

And, finally, the contract provides that "To further liquidate the obligation" (referring to any balance due on the contract price of the interest in the patent sold to the vendee), the vendee agreed that all of the income, both principal and profits coming to him from the business of the corporation should remain intact, to be paid over to the vendor, Vass, until the balance of the contract price was paid.

These words are unambiguous and clearly mean that the defendant would pay the balance due the vendor by receiving credit for the advances just stated, the balance to be paid out of the income coming to defendant from the business of the corporation.

The evidence shows that in addition to the initial payment

of \$3500 in cash and the two notes of \$1000 each, which were paid, defendant advanced, on account of the expenses of the contract for 500,000 sets of plugs and for current expenses of the corporation, between \$7000 and \$8500. The jury correctly construed the contract in this respect by allowing defendant credit for these amounts, thus awarding plaintiff \$12,000 instead of \$19,400, claimed by him.

The jury, however, did not go far enough and should have construed the last provision as we have indicated. The evidence showed that the corporation never made any profit but that there was a loss of approximately \$5000. There was, therefore, no income coming to defendant out of which he could pay the balance of the purchase price ~~of the stock.~~ *il*

Another factor which necessitates a reversal of the judgment is the failure of the vendor, Vase, to keep his agreement to assign over to the corporation his 46 per cent interest in the patent. There was testimony that he was repeatedly requested to do so, and that he replied "he was going to hold off to see how it went, because under the patent law, if he held it now, he still had a right to start a separate corporation with his interest in the patent."

For the reason that the contract provided that defendant would pay plaintiff the balance when his profits, accumulated in the treasury of the corporation, should be sufficient to pay, and there were no profits, and because, also, plaintiff declined to carry out his agreement as to the assignment of his interest in the patent to the corporation, there can be no recovery in this case.

Defendant made a motion at the close of plaintiff's case for a directed verdict for defendant, and also after verdict for a judgment non obstante veredicto. The latter motion should have been allowed. The judgment is therefore reversed, and, as upon a proper construction of the contract and the undisputed evidence plaintiff cannot recover, the cause will not be remanded.

REVERSED.

O'Connor, F. J., and Matchett, J., concur.

of 1880 in each and the two notes of 1880 each. This was said,
testimony appeared, on account of the absence of the contract for
1880, and each of which had the same amount of the testimony,
between them and him. The first testimony was given in
in this respect by a single statement which was made, that
concerning the 1880, was made of 1880, which was said.
The jury, however, did not go far enough and should have
examined the last provision as to have noticed. The witness
showed that the corporation never made any profit and that there was
a loss of approximately \$1000. There was, therefore, no income which
to be taken out of which he would pay the balance of the interest
which was due.

Another factor which necessitated a payment of the interest
in the fall of the year, was, to have his statement in regard
out to the corporation his 50 per cent interest in the past. There
was testimony that he was personally responsible to the 50, and that he
testified that he had to pay 50 per cent of the interest which
the interest was, it was said he now, he said he had a right to have a
corporate corporation with his interest in the past.

For the reason that the contract provided that the balance
would pay directly the balance when his profits, accumulated in the
absence of the corporation, shall be distributed to him, and that
there be profits, and because, also, plaintiff desired to have only
his statement as to the amount of his interest in the past in
the corporation, there can be no recovery in this case.

Defendant made a motion at the close of plaintiff's case for
a directed verdict in defendant, and also after verdict for a judge.
The latter motion should have been al-
lowed. The judgment in defendant's favor, and, as when a proper
examination of the contract and the material evidence of plaintiff
would reveal, the same will not be permitted.

REVEREND

37459

R. F. WILSON & COMPANY,
a corporation,

Appellant,

v.

T. M. WHITE COMPANY,
a corporation,

Appellee.

9 H
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

279 I.A. 617²

MR. PRESIDING JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On February 23, 1933, plaintiff, as the contractor, commenced an action in assumpsit against defendant, as the sub-contractor, for damages for the claimed breach of a written contract, executed by the parties on December 15, 1931, for the doing by defendant of the general excavation work and the removal from the premises of all excavated materials for a new office building for the Illinois Bell Telephone Company at 1338-48 West Monroe street, Chicago. Plaintiff's declaration consisted of a special count and the common counts, to which originally defendant filed a plea of the general issue and two special pleas. Subsequently, after replications had been filed, defendant filed two additional special pleas and a plea of set-off, to which replications also were filed. Plaintiff claimed damages in the sum of \$3,549.52. The cause was tried before a jury during November, 1933, at which much oral and written evidence was introduced by the parties, resulting in the jury "finding the issues for defendant and assessing defendant's damages on its set-off at the sum of \$200." On January 22, 1934, defendant moved that the court remit from the verdict the sum of \$199.99, the remittitur was allowed, and the court entered judgment against plaintiff "for damages in the sum of one cent,

M. T. WILSON & COMPANY,
a corporation,

Defendants,

v.

T. A. LEWIS COMPANY,
a corporation,

Plaintiff.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS,

IN AND FOR THE COUNTY OF COOK.

STY L.A. 317

THE FOLLOWING VERDICT WAS RETURNED BY THE JURY:

IN FEBRUARY 22, 1922, Plaintiff, as the contractor,

commenced an action in superior against defendant, as the sub-

contractor, for damages for the alleged breach of a written con-

tract, executed by the parties on November 11, 1911, the said con-

tract providing for the removal of the general excavation work and the removal from

the premises of all excavated materials for a new office building

for the Illinois Bell Telephone Company at 1735-1741 West Adams

street, Chicago. Plaintiff's testimony consisted of a special

verdict and the general verdict, as well as a special verdict

in favor of the general issue and two special issues. Independently

after verdicts had been filed, defendant filed two additional

special issues and a plea of assumpsit, to which verdicts also

were filed. Plaintiff claimed damages in the sum of \$2,500.00.

The cause was tried before a jury during November, 1922, at which

much oral and written evidence was introduced by the parties.

resulting in the jury finding the issues for defendant and assessing

defendant's damages on the assumpsit at the sum of \$200.00. On January

12, 1923, defendant moved that the court set aside the

sum of \$200.00, the verdict was allowed, and the court entered

judgment against Plaintiff "for damages in the sum of one cent."

and costs of suit." Plaintiff by this appeal seeks to reverse the judgment.

A copy of the sub-contract sued upon was set forth verbatim in plaintiff's special count, and on the trial the original was introduced in evidence. It is on a printed form, drafted and in common use by it in its business as a general contractor, but before its execution certain additional provisions were added in typewriting - one to the 1st paragraph and another to the 24th paragraph. The present controversy arises largely because of these provisions, which in the 1st paragraph may for convenience be termed the "rider" or the "five day clause," and are as follows (italics ours):

"It is understood that the contractor (plaintiff) is to carry on its work on this job in certain trades on the Open Shop basis, commonly known as the Landis Award. And the sub-contractor (defendant) agrees to carry on his work with Union mechanics, and hereby guarantees that there will be no stoppage of his work for any reason whatsoever; and the subcontractor further agrees that should his men strike or otherwise refuse to work on this job, in that event he will secure other men to complete the work, and if he fails to resume his work within five days after any stoppage, the contractor, at his option, can take over and complete the sub-contractor's work, as he may see fit, at the expense of the sub-contractor, using the sub-contractor's equipment for such completion without charge."

In the 24th paragraph, after it is stated in printed type that "the sub-contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times stated below," there are the following provisions in typewriting, which may for convenience be termed the "24-hour clause" (italics ours):

"Work shall be commenced within twenty-four (24) hours after notification by the contractor to the sub-contractor to start work.

It is further understood and agreed that the sub-contractor will complete the general excavation as directed, within fourteen (14) days after commencing work, and shall install the required number of steam shovels and equipment necessary to accomplish this purpose."

In plaintiff's special count, after alleging the execution of the sub-contract on December 15, 1931, it is averred in part that

"on or about December 24, 1931, plaintiff notified defendant to commence work under the contract within 24 hours after the receipt of said notice;" that defendant failed and neglected so to do; that thereafter, "on December 29, 1931, plaintiff notified defendant in writing that by reason of its failure to carry out the provisions of the contract, plaintiff would proceed to employ others to do the work and would hold defendant liable for damages suffered by it by reason of such failure;" that thereafter "plaintiff contracted with the Valparaiso Construction Co. to do the work called for under the contract at a cost of \$8,365.52;" that the total yardage excavated, as determined by a cross-section plotting, amounted to 6020 cubic yards; that by the contract defendant had agreed to make the excavations on a basis of 80 cents per cubic yard, amounting to \$4,816; that by reason of defendant's acts and its breach of the contract it has become liable to plaintiff in the sum of \$3,549.52 (the difference between \$8,365.52 and \$4,816); that plaintiff was always ready and willing to perform its part of the contract; and that by reason of defendant's failure and refusal to carry out its terms, plaintiff has been damaged in said sum of \$3,549.52.

In defendant's original two special pleas the defense is in substance that no damage was suffered by plaintiff. In one it is averred that plaintiff was not obliged to be put to the necessity of paying any sum in excess of \$4,816, for the cost of the work, etc. In the other it is averred that the amount of \$8,365.52, paid by plaintiff for procuring the work to be done, was in excess of the amount for which it, in the exercise of ordinary diligence, could have procured persons other than defendant to have done the work. Defendant's two additional special pleas set forth other defenses which were not stressed upon the trial. Defendant's main defense, strenuously urged upon the trial, is also stated in its said plea

"On or about December 24, 1951, Plaintiff advised defendant as
announced herein under the contract within 24 hours after the receipt
of said notice;" that defendant failed and neglected to do so;
that defendant, "on December 24, 1951, Plaintiff advised defendant
in writing that by reason of the failure to carry out the provisions
of the contract, Plaintiff would proceed to employ others to do the
work and would hold defendant liable for damages suffered by it by
reason of such failure;" that defendant "Plaintiff advised that
the Valparaiso Construction Co. to do the work called for under the
contract at a cost of \$4,281.83;" that the actual damages sustained
as determined by a cross-section sampling, amounted to \$688.46;
verbal; that by the contract defendant had agreed to make the undersigned
an owner of the work for which party, amounting to \$4,281.83, by
reason of defendant's failure and the cost of the contract to the
undersigned to Plaintiff in the sum of \$4,281.83; the difference
between \$4,281.83 and \$4,281.83; that Plaintiff was always ready and
willing to perform the part of the contract and that by reason of
defendant's failure and refusal to carry out the terms, Plaintiff
has been damaged in said sum of \$4,281.83.
In defendant's original two special pleas the balance is
in substance that no damage was suffered by Plaintiff. In one it is
averred that Plaintiff was not obliged to be put to the necessity of
performing the work in question by Plaintiff, for the work in the contract, and
in the other it is averred that the amount of \$4,281.83, paid by
Plaintiff for performing the work to be done, was in excess of the
amount for which it, in the services of various employees, would
have been paid pursuant with some attention to save time and work.
Defendant's two additional special pleas set forth other defenses
which have not appeared upon the record. Defendant's main defense,
expressly urged upon the trial, is also stated in the said plea

of set-off, in which it is averred in substance,

that defendant was ready and able to perform the excavating work, required to be done by it under the contract, when notified to do it, according to its terms; that plaintiff, in violation of said terms, "entered with men, machinery and equipment, of plaintiff's own procurement and hiring, upon the work," undertaken and agreed to be done by defendant under said contract, "within less than the 5 days" provided for in said contract, whereby defendant was hindered and prevented from performing the work to be done by it under said contract, although it, "within less than the period of 5 days," was ready and able," with a full force and equipment of machinery and union mechanics," to perform all the work required by the contract; and that by reason of plaintiff's conduct and its breach of said contract, and through no fault of defendant, defendant was unjustly deprived of large profits, and suffered damages.

On the trial plaintiff's principal witness was its president, Robert F. Wilson. Several other witnesses testified for it, including its superintendent, Fred Nelson, and several officials of the Valparaiso Construction Co. Defendant's principal witness was Thomas L. Russell, its secretary. Other witnesses testified for it, including Lloyd B. Little (business agent of Local, 150, International Union of Hoisting Engineers, affiliated with the American Federation of Labor) and George Long (a steam shovel engineer and a member of said Local Union.) Several letters, passing between the parties, and other writings were introduced in evidence. The material facts disclosed are in substance as follows:

On December 24, 1931, plaintiff sent a letter by registered mail to defendant, which was received by defendant on Saturday, December 26th, - the day after Christmas. The letter, after referring to the contract of December 15th, is as follows (italics ours):

You are hereby notified that the site will be cleared and ready for you at 7:00 A.M., Monday, December 28th, 1931, and that we desire you to have your equipment on the premises at that time, ready to start work, and to proceed with the completion of your contract without further delay.

We are advised by your Representative, Mr. Russell, that your Engineers and Chauffeurs are on strike against this particular job.

We wish to call your attention to the paragraph contained in the rider (or five days' clause) attached to this contract, providing for contingency of strike or refusal of any of your men to work on this job.

This is to notify you that unless you can settle your

labor troubles and make arrangements to proceed with this contract within the legal time, as specified in the contract, we shall proceed with the work with whatever equipment and men we can obtain and under whatever conditions may be necessary in order to complete this excavation and that we will charge to your account any expense or cost of this work over and above the 80 cents per yard called for in the contract to your account and take any legal steps necessary to collect any balance due us because of cost for the work over and above the 80 cents per yard prescribed in the contract.

We would appreciate your advising us by return mail just what you propose to do, so that we may not be put to the expense of ordering equipment to the job, if you can arrange to go ahead with the contract.

Immediately after the receipt of this letter defendant, by its representatives, took steps to overcome the labor troubles that it was having as to the particular job, and of which troubles plaintiff had been advised. Numerous telephone conversations were had with representatives of plaintiff regarding the progress being made therein, but on Tuesday afternoon, December 29th, (about one day after the time that defendant had been directed by plaintiff to start work), and without awaiting the outcome of defendant's negotiations to overcome said labor troubles, plaintiff entered into a contract with the Valparaiso Construction Co. for the doing by it of the excavation work, and on the same day caused or allowed that company to move its equipment on to the job-site, ready for work on the following day. That company was a non-union Landis Award Company, and did "emergency" work. On the afternoon of the same day (December 29th) Russell, defendant's main representative in the pending negotiations, had a telephone conversation with plaintiff's president, Wilson, and advised him of the progress of the negotiations, and stated that the outlook of a successful termination thereof was good, that the Local Union was going to have a meeting that evening about the matter and that all labor troubles probably would then be settled. In this conversation, according to Russell's testimony, Wilson expressed indifference as to whether the troubles were settled or not. On the same evening said Local Union came to an agreement and directed

certain of its particular men, whom defendant wanted for the particular excavating work, to go on the job, etc., and the existing disputes apparently were ended, and because of this outcome defendant ordered its steam shovel, manned by union mechanics (as mentioned in the contract sued upon), to be moved onto the job-site, and to be ready to proceed with the excavation work on Wednesday morning, December 30th. On that morning representatives of the Local Union found the Valparaiso Construction Co. in possession, carrying on the excavation work with its steam shovel and other equipment. Thereafter defendant's further efforts to proceed with the job under the contract sued upon proved unavailing.

On the morning of Tuesday, December 29th, plaintiff, by said Wilson as president, sent to defendant the following letter (*italics ours*):

Following up our letter to you of December 24th, we beg to advise you as follows:

Inasmuch as you have not lived up to the terms of the contract of December 15th, "in commencing work within 24 hours after notification by the undersigned to you to start work," but have "apparently ignored the notification," and "have thereby failed to live up to said contract," it "will be necessary (?) for the undersigned to employ others to do the work and supply the materials called for in said contract, and the undersigned advises you that it will proceed to employ others to do said work and supply said materials, and will hold you responsible and liable for any and all loss and damage of every kind suffered by the undersigned as a result of your failure to live up to and carry out the terms and conditions of said contract, and will charge to you the cost of the work which the undersigned has to employ others to do because of your aforesaid failure to live up to the terms of the contract."

On Thursday, December 31st, defendant sent the following letter to plaintiff (*italics ours*):

"You are hereby notified that under the terms of the contract of December 15, 1931, by and between the undersigned and your corporation, wherein the said F. M. White Co. was referred to as the subcontractor, and wherein it was covenanted that the Subcontractor was obligated to carry on the work therein mentioned with Union mechanics, a condition has arisen between your corporation and the Union having jurisdiction over the mechanics necessary to be employed in connection with this operation by reason of certain acts of yours, or for which you are responsible, and as a consequence thereof said Union will not permit said mechanics to perform the work required under this contract for the undersigned.

...of the particular work, as on the job, and the existing
...were ended, and because of this outcome defendant
...by using shovel, named by major machinery (as mentioned in
...to be moved onto the job-site, and to be
...on Saturday morning,
...representative of the local Union
...the Volcanic Construction Co. in possession, carrying on the
...with the steam shovel and other equipment. There-
...proceed with the job under the
...after defendant's further efforts to proceed with the job under the
...was upon proved unavailing.

On the morning of Tuesday, December 23rd, plaintiff, by
...the following letter,
...to the effect that

Following up our letter to you of November 23rd, we beg
to advise you as follows:
Inasmuch as you have not lived up to the terms of the
contract of December 19th, "inasmuch as you are not ready, but have
refused to live up to the contract," and "you have failed to
live up to the contract," it will be necessary for you to
understand to which extent you are not ready and ready the contract
ended for in said contract, and the defendant advise you that
it will proceed to employ others to do said work and hereby advise
that, and will hold you responsible and liable for any and all
loss and damage of every kind suffered by the defendant as a result
of your failure to live up to and carry out the terms and conditions
of said contract, and will charge to you the cost of the work which
the defendant has to carry out to be done at your expense
to live up to the terms of the contract."

On Thursday, December 24th, defendant sent the following
letter to plaintiff (enclosed copy):

"You are hereby notified that under the terms of the
contract of December 19th, 1931, by and between the defendant and
your corporation, wherein the said T. M. White is, and signed in
the presence of, and wherein it was agreed that the
defendant was to carry on the work under contract
with Union Machinery, a condition was entered between your corporation
and Union Machinery that the defendant was to be
employed in connection with the operation of the said
of your, or for which you are responsible, and as a consequence
thereof said Union Machinery will hold defendant liable for the
work which under said contract the defendant is to carry out."

You are further notified that by reason of your actions and the acts for which you are responsible your company has made it impossible for the undersigned, the subcontractor under said agreement, to proceed under the terms of the contract.

You are further notified that unless the conditions which you have caused which have made it impossible for this subcontractor to proceed with the work under said contract are remedied at once so as to permit the undersigned to proceed under said contract, the undersigned shall consider this contract breached by you and hold you liable for any damages which the undersigned shall sustain by reason of your corporation making it impossible for the undersigned to perform its agreement."

On January 28, 1932, plaintiff sent a letter to defendant in which, after referring to the subcontract of December 15, 1931, and plaintiff's letters of December 24th and December 29th, it is stated as follows (italics ours):

"On account of your failure to proceed with this work, in accordance with the terms of your contract, we were obliged to re-let (?) this contract to the Valparaiso Construction Co. This contractor has now completed your work in a satisfactory manner and the cost to us of this work amounts to \$8,565.52 as evidenced by the enclosed bill from the Valparaiso Construction Co.

We also enclose herewith, copy of Cross Section Plat prepared by H. H. James & Co., showing a total yardage for this job of 6,020 yards, which, at your contract price of 80 cents per yard, would have cost us \$4,816.

The excess cost to us, therefore, on account of your failure to fulfill your contract, amounts to \$3,549.52.

We herewith make demand on you for the payment of this excess cost and request that you advise us immediately when you propose to take care of this obligation. Should we fail to hear from you within a reasonable time, stating when and how you will take care of this payment, we will turn the matter over to our attorneys for collection without further notice."

Counsel for plaintiff first contend that the "verdict and judgment are contrary to the undisputed evidence." After careful consideration of the evidence, and of the comments thereon made by the respective counsel in their briefs, we are unable to agree with the contention.

Counsel for plaintiff also contend that the verdict and judgment cannot be sustained under a proper construction of the provisions of the contract of December 15, 1931, sued upon. The argument is, as we understand it, that the provisions contained

You are further notified that you are not
 entitled to any of the above mentioned
 benefits for the reasons stated above.
 The undersigned is a member of the
 undersigned, as provided under the
 provisions of the contract.

to perform the agreement."

reason of your corporation making it impossible for you to make any
you will not be able to make any more money than you are now making
will consider this agreement binding by you and held
it is the understanding to proceed with this agreement, the
is given with the work under said contract and remained as once as
have agreed which have made it impossible for this independent
You are further notified that unless the conditions which

On January 28, 1952, Plaintiff sent a letter to defendant in which, after referring to the subpoenaed of December 18, 1951, and Plaintiff's letters of December 24th and December 27th, it is stated as follows: (Exhibit 5)

The amount of your failure to proceed with this work, in accordance with the terms of your contract, was collected by the Volpeltine Construction Co., Inc. (V) in contract to the Volpeltine Construction Co., Inc. (V) and has now completed your work in a satisfactory manner and the cost of this work amounts to \$1,000.00 as stated by the enclosed bill from the Volpeltine Construction Co.

We also enclose herewith, copy of Gross Receipts List
 prepared by J. E. Jones & Co., showing a total income for this
 job of \$100,000.00, which is your estimated price of 50 units.
 See memo, dated March 24, 1944.

James A. Callaghan, President of the
The Council shall be in, whenever, in person, at your

[illegible]

and judgment are contrary to the undisputed evidence."

of the respective counsel in their briefs, we are unable to agree with the submission.

argument is, as we understand it, that the provisions contained
in the contract of December 18, 1901, read upon the
entirement cannot be understood without a proper construction of the
Contract of December 18, 1901, which was made by the

in the 24th paragraph (or 24 hour clause) alone should govern, without taking into consideration the typewritten provisions (or five day clause) as contained in the 1st paragraph of the contract. We cannot agree with the contention of this argument. All provisions of the contract should be considered together. And we cannot agree with plaintiff's counsel's further argument that the provisions of said "five day clause," or rider, "do not apply to the time that work shall be commenced in the first instance, but only apply after the work had been commenced, and there is thereafter a stoppage of such work, in which event the subcontractor (defendant) shall be allowed five days to resume work." In view of all the provisions of the contract, and considering the peculiar facts and circumstances as disclosed from the evidence, we regard such a construction as strained and hypercritical. And such a construction was denied by the court, as is evidenced by the court's modification of plaintiff's instruction No. 1, as tendered, and giving it to the jury as modified. The instruction as tendered was as follows:

"The Court instructs the jury that the contract dated December 18, 1931, between R. F. Wilson & Company and T. M. White Company provides, among other things, that the sub-contractor agrees to carry on his work with Union mechanics and guarantees that there will be no stoppage of his work for any reason whatsoever, and further agrees that should his men strike or otherwise refuse to work on the job, that in that event he will secure other men to complete the work, and if he fails to resume his work within five days after any stoppage, the contractor, at his option, can take over and complete the sub-contractor's work, as he may see fit, at the expense of the sub-contractor.

"The Court instructs the jury that this provision of the contract applied only in the event the sub-contractor had commenced work and thereafter stopped work, and if the jury believe from a preponderance of the evidence, under the instructions of the Court, that the T. M. White Company never commenced work, the said provision does not apply."

The court modified this tendered instruction by striking out the second clause, (above in italics). We do not think that this modification constituted error, as plaintiff's counsel contend.

Counsel also contend that the court committed reversible

error in giving to the jury instructions Nos. 6 and 8, as tendered by defendant. We have carefully considered these instructions, in connection with all the given instructions, with the provisions of the contract sued upon and with the facts and circumstances as disclosed by the evidence, and are of the opinion that both instructions were properly given. And we do not think that any prejudicial error was committed by the court in refusing to give plaintiff's refused instruction No. 2. And it is our opinion, considering all the given instructions, that the jury were fully and fairly instructed.

Finding no reversible error in the record, the judgment against plaintiff of January 22, 1934, appealed from, is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

error in giving to the jury instructions Nos. 5 and 6, as demanded
by defendant. It has carefully considered these instructions, in
connection with all the given instructions, with the provisions of
the contract and again with the facts and circumstances as
disclosed by the evidence, and one of the opinion that both in-
structions were properly given, and we do not think that any
reversible error was committed by the court in refusing to give
defendant's revised instruction No. 5. And it is our opinion,
considering all the given instructions, that the jury were fully
and fairly instructed.

It being no reversible error in the record, the judgment
against plaintiff of January 11, 1914, entered there, is affirmed.

WITNESSES,

WILLIAM H. HALL, JR., CLERK.

37468

FRANK GALLO,
Appellee,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 617³

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$1100, rendered against it on December 27, 1933, following a trial before the court without a jury. The action, commenced on September 6, 1933, was based upon a certificate of life insurance, issued by defendant to Ernest Gallo on February 7, 1932, under the provisions of defendant's group policy on the lives of the employees of the National Biscuit Company (hereinafter called the Biscuit Co.) Ernest Gallo died on November 21, 1932, and plaintiff was the beneficiary named in the certificate.

Among the allegations in plaintiff's statement of claim are: (1) That Ernest Gallo was a policy holder in the defendant company and had paid all premiums up to the time of his death, and (2) that at that time he "was employed" by the Biscuit Co. Defendant's defense, as stated in its affidavit of merits, was that in accordance with the terms of the group policy "the said certificate of insurance was not in force" on the date of the death of Ernest Gallo "because he had left the employ of his employer" (the Biscuit Co.) "prior to November 9, 1932;" that his insurance "was cancelled on November 15, 1932;"

1938

THE COURT

IN THE

7.

IN THE MATTER OF THE ESTATE OF
JAMES H. HARRIS, DECEASED
TESTAMENTARY TRUST

ALFRED T. HARRIS

OF THE COUNTY OF

2791A.617

MR. HARRIS' ESTATE TRUST SHALL BE THE TRUST FOR THE ESTATE.

By this appeal defendant seeks to reverse a judgment

for \$100,000, judgment entered in the County of Cook, Illinois

a trial before the court entered a jury. The action, commenced

on September 8, 1933, was based upon a certificate of life

insurance, issued by defendant to Ernest Galle on February 7,

1933, under the provisions of defendant's group policy on the

lives of the employees of the National Electric Company (hereinafter

also called the Electric Co.) Ernest Galle died on November

21, 1933, and plaintiff was the beneficiary named in the

certificate.

Among the allegations in plaintiff's statement of

claim are: (1) That Ernest Galle was a policy holder in the

defendant company and had paid all premiums up to the time of

his death; and (2) that at that time he "was employed" by the

Electric Co. Defendant's defense, as stated in its affidavit

of denial, was that in accordance with the terms of the group

policy "the said certificate of insurance was not in force" on

the date of the death of Ernest Galle "because he had left the

employ of his employer" (the Electric Co.) "prior to November 9,

1933." That his insurance "was cancelled on November 12, 1933."

and that "within 31 days after his lay-off, this defendant was notified that said lay-off was to be considered a termination of his employment in accordance with the provisions of said group policy."

On the trial the group policy, the certificate of insurance and certain other writings were admitted in evidence. Plaintiff's only witness was Frederick S. Nye, employment manager at Chicago of the Biscuit Co. For defendant three witnesses testified, viz: Joseph Dasaro (foreman of the icing department of the Biscuit Co. at its Lexington street plant in Chicago); Frank J. Cathamer (cashier of the Biscuit Co. at the plant); and Louis R. Appleton (superintendent of the plant.) And defendant also introduced in evidence the depositions of two other witnesses taken in New York. Some of the facts as disclosed from the evidence are in substance as follows:

Ernest Gallo commenced working as an employee of the Biscuit Co., at its Lexington street plant about August 7, 1931. After working there for over six months the certificate of insurance under the group policy was issued to him by defendant under date of February 7, 1932. At that time and thereafter the regular employees (Gallo being one) of the Biscuit Co. did not work continuously. Sometimes they were temporarily laid off. As one witness testified: "Some days they (the Biscuit Co.) worked fifty-five men and the next day only four." The policy provided that the major portion of the premiums for the insurance should be paid by each employee insured and the balance (at least 25%) by the Biscuit Co. It was the usual practice that the amount of the monthly premiums were deducted from the payments due for wages or salary. Sometime during the month of October, 1932, Gallo and other employees working under the foreman, Dasaro, were notified verbally that all insurance premiums should be paid by the 15th day of the month. Dasaro testified: "I told each employee that unless the insurance premium was paid on the 15th of the month, and no later than the 15th, the insurance would be cancelled, and that if they did not have any money coming for this particular period they should come down personally and pay the fifty cents so that they would be assured of holding their insurance." Gallo's insurance premium for the month of October was paid. On November 9, 1932, he worked as a regular employee for three hours and was paid therefor on November 11th. It does not appear that the insurance premium payable November 15th was deducted therefrom, on which particular date no money was coming to him for work done, and he did not pay in cash on that date the monthly premium. He again worked as a regular employee on November 18th for nine hours, but he was not paid for that work, and at the time

and that "within 31 days after his lay-off, this defendant was notified that said lay-off was to be considered a termination of his employment in accordance with the provisions of said group policy."

On the trial the group policy, the certificate of

insurance and certain other writings were admitted in evidence.

WITNESSES: JOHN J. KILPATRICK, JR., President of the

at Chicago of the Illinois Co. For a certain three witnesses testi-

fied, viz: Joseph Romano (foreman of the firing department of the

Illinois Co. at the Washington street plant in Chicago); Frank J.

Cathman (cashier of the Illinois Co. at the plant); and Louis H.

Johnson (superintendent of the plant). The defendants also intro-

duced in evidence the deposition of two other witnesses taken in

New York. Some of the facts as disclosed from the evidence

are in substance as follows:

Witness John J. Kilpatrick, Jr., president of the

Illinois Co., at the Washington street plant in Chicago, testified that after certain matters had been discussed with the committee at Wash-

ington under the group policy was issued to him by the company on the date of February 7, 1934. At that time and thereafter the company employed (and paid) him at the Illinois Co. and was con-

tinuously employed. When then they were temporarily laid off, he con-

tinued to receive "some other work" (the Illinois Co.) until the policy provided

that the policy was to be terminated. The Illinois Co. then paid him the money he was entitled to receive and the money he was entitled to receive.

The Illinois Co. then paid him the money he was entitled to receive and the money he was entitled to receive.

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The Illinois Co. then paid him the money he was entitled to receive and the money he was entitled to receive.

of his death three days later on November 21st, there was a credit to him on the books of the Biscuit Co. more than sufficient to pay the premium for his insurance payable on November 15th. In the meantime the Biscuit Co., on November 15th, by its cashier, caused Gallo's insurance card to be stamped "cancelled," and thereafter mailed to New York, where it was received by defendant on November 23rd (two days after Gallo's death), and a few days thereafter defendant cancelled Gallo's insurance as of November 15, 1932. The policy also provided in substance that upon the "termination" of the employment of an employee his insurance was to terminate. But it does not appear that Gallo was ever notified during his lifetime by anyone that his employment with the Biscuit Co. had been terminated. The policy also provided in substance that a grace of 31 days should be granted to the employer for the payment of premiums after the first, during which period the insurance should continue in force.

At the conclusion of the trial defendant's motion for a directed verdict in its favor was denied, and the court found the issues against it, assessed plaintiff's damages in the sum of \$1100, and, after motions for a new trial and in arrest of judgment had been overruled, entered the judgment against defendant as first above mentioned. It was not disputed that if plaintiff was entitled to recover anything of defendant, the amount should be \$1100. The bill of exceptions discloses that prior to the entry of the finding the court made in part the following statements in substance:

I am going to find in this case as follows: That this man was in the employ of the Biscuit Co. at the time of the supposed cancellation of the certificate; that this is shown by the evidence and particularly by the fact that he worked for the Biscuit Co. after said supposed cancellation; that nothing in the record discloses that he was laid off permanently on November 9, 1932; that no notice was given to him, after the supposed termination of his employment, or supposed cancellation of his certificate, of those actions; that on the contrary, he was telephoned to by the foreman (Dasaro) on November 17th or 18th, with reference to again reporting for work; and that by virtue of the wording of the policy he "had certain rights" as to his insurance, because he either contributed to the premiums therefor by deductions from his salary, or voluntarily paid them.

"I realize that under the law one must pay his premiums in order to have his insurance, but under the policy in question I think that they (the employees of the Biscuit Co.) are entitled to notice, even after a certain time, that they have not paid their insurance. These employees actually contribute. * * * From the evidence I am going to find the issues for plaintiff."

Counsel for defendant here make two contentions, as grounds for a reversal of the judgment, viz., (1) Plaintiff did

not sufficiently prove that Ernest Gallo was insured on the date of his death; and (2) the finding and judgment are against the manifest weight of the evidence. After carefully reviewing the present record, the briefs and arguments of opposing counsel and numerous authorities cited therein, we are unable to agree with either contention. We are of the opinion that the trial court's finding and judgment is amply sustained by the evidence and by the law. In this connection the following adjudicated cases may appropriately be cited: Cogsdill v. Metropolitan Life Ins. Co., 158 Mo. Car. 371, 373-4; Deese v. Traveller's Ins. Co., 204 Mo. Car. 214, 215-6.

The judgment of the municipal court against defendant should be and is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

37493

GENEVIEVE KENNEDY,
Appellee,

v.

FRANK E. CAREY,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

279 I.A. 6174

MR. PRESIDING JUDGE CHIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident about 2:30 o'clock on the morning of December 18, 1932, there was a trial before a jury, at which a mass of oral evidence and photographs and X-ray pictures were introduced, resulting in the return of a verdict finding defendant guilty and assessing plaintiff's damages at \$12,500. On January 20, 1934, the court required plaintiff to remit \$4,000, and entered a judgment against defendant for \$8500, which by the present appeal is sought to be reversed.

Plaintiff's declaration consisted of four counts, to which defendant filed a plea of not guilty. In the first count it is averred in substance that on December 18, 1932, defendant was in possession and control of an automobile (a Packard car), being operated on a public highway, known as Roosevelt road, or Route No. 6, in or near to the City of Geneva, Kane County, Illinois; that plaintiff was riding in another automobile (a Ford car), being driven in an easterly direction over said highway there; that defendant should have seen plaintiff and the automobile in which she was riding as it approached defendant's automobile; that defendant so negligently operated his automobile "that the automobile in which plaintiff was riding was caused to strike and

THE STATE OF ILLINOIS
COUNTY OF COOK

BEFORE ME, the undersigned authority, on this day personally appeared
[Name], known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this day of [Month], 19[Year].

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office this day of [Month], 19[Year].

Notary Public in and for the State of Illinois

Plaintiff's declaration consisted of two counts, to which defendant filed a plea of not guilty. In the first count it is averred in substance that on December 15, 1932, defendant was in possession and control of an automobile (a Ford car), being operated on a public highway, known as Roosevelt road, on Route No. 8, in or near to the City of Chicago, Cook County, Illinois; that plaintiff was riding in another automobile (a Ford car), being driven in an easterly direction over said highway; that defendant's vehicle was then and there negligently operated in which she was riding as it approached plaintiff's automobile; that defendant negligently operated his automobile "that the automobile in which plaintiff was riding was caused to swerve and

collide with defendant's automobile on said highway;" and that plaintiff, being then and there in the exercise of due care for her own safety, was thereby thrown against divers objects in the automobile in which she was riding and seriously and permanently injured, etc. In the second count the charge is that defendant negligently operated and controlled his automobile in said highway, "without exhibiting on said vehicle two lighted lamps of a white light or lights of a yellow or amber tint, visible at least 200 feet in the direction in which his vehicle was proceeding, and one lighted lamp so situated as to throw a red light visible in the reverse direction," contrary to the statute, etc. In the third count the charge is that defendant negligently caused his automobile "to stand on said public highway there, without displaying any lights on the front or the rear of the vehicle, although it was then during the period from one hour after sunset to sunrise," contrary to the statute, etc. In the fourth count the charge is that defendant, "although it was then night time and dark on said highway there, negligently and carelessly caused and permitted his said motor vehicle to stand on said highway there, without giving plaintiff, or the person operating the motor vehicle in which she was riding, any warning, by means of lights or any other means, of the presence of his said motor vehicle on said highway there," etc.

On the trial plaintiff was a witness in her own behalf and she testified as to the details of the accident. She was an occupant of the Ford car, sitting on the front seat at the time to the right of its owner and operator, Walter Sauber, who testified as her witness at considerable length. Two other occupants of the car, sitting on the back seat, also testified for her. Defendant, the owner and operator of the Packard car, was his principal witness. Four other occupants of the Packard car, called as his witnesses, gave their versions of the accident. From the

collide with defendant's automobile on said highway," and that plaintiff, being then and there in the driver of the car for her own safety, was thereby thrown against objects in the automobile in which she was riding and seriously and permanently injured, etc. In the second count the charge is that defendant negligently operated and controlled his automobile in said highway "without exhibiting on said vehicle two lighted lamps of a white light or lights of a yellow or amber tint, visible at least 500 feet in the direction in which his vehicle was proceeding, and one lighted lamp or lamps as to which a red light vehicle in the reverse direction," contrary to the statute, etc. In the third count the charge is that defendant negligently caused his automobile to come in contact with plaintiff's automobile, which was then driving on the track or the rear of the vehicle, although it was then during the period from one hour after sunset to sunrise," contrary to the statute, etc. In the fourth count the charge is that defendant, "although it was then night time and dark on said highway there, negligently and carelessly caused and permitted his said motor vehicle to come in contact with plaintiff's vehicle, which was driving on the person operating the motor vehicle in which she was riding, any warning, by means of lights or any other means, of the presence of his said motor vehicle on said highway there," etc.

On the fifth plaintiff was a witness in her own behalf and she testified as to the details of the accident. She was an occupant of the Ford car, sitting on the front seat at the time to the right of the owner and operator, Walter Lumber, who testified as her witness of considerable length. Two other occupants of the car, sitting in the back seat, also testified for her.

Defendant, the owner and operator of the Packard car, was his principal witness. Four other occupants of the Packard car, called as his witnesses, gave their versions of the accident. From the

evidence it appears in substance that the Packard car, coming from the west, entered the city of Geneva and was travelling easterly through it on Roosevelt road; that near the east limits of the city there was a curve in the road to the left; that just after the car had rounded the curve it stopped because its supply of gasoline had become exhausted; that shortly thereafter the Ford car, also having come from the west and having travelled easterly through Geneva on the same road, approached said curve; that before it reached the curve its driver did not and could not see the standing Packard car; that after the Ford car had rounded the curve, travelling at the rate of about 25 miles an hour, its driver did not see the Packard car in time to avoid a collision; and that a front part of the Ford car violently collided with a rear part of the Packard car, causing plaintiff's injuries. The testimony of plaintiff's witnesses was in irreconcilable conflict with that of defendant's witnesses on the questions (a) whether the collision occurred a few feet beyond the curve or many feet beyond it where the road was straight, (b) whether or not the tail-light on the Packard car was burning at the time, and (c) whether or not the street lights on the road were lighted. As to the front lights on the Ford car its driver, Sauber, testified on cross-examination that he did not see any car ahead of him until he got within 25 feet of the Packard car and that he then saw it because his "bright lights" shone upon it, which lights throw light ahead 40 or 50 feet, and that his front lights had two beams, "one straight ahead and one down-tilt."

The main contention of defendant's counsel is in substance that the jury's verdict is manifestly against the weight of the evidence on the questions of defendant's negligence and plaintiff's contributory negligence. We cannot agree with the

evidence is shown in substance that the Ford car, coming from the west, entered the city of Geneva and was travelling westerly through it on Highway 10; that near the west limit of the city there was a curve in the road to the left; that after the car had rounded the curve it stopped because the supply of gasoline had become exhausted; that shortly thereafter the Ford car, also having come from the west and having travelled easterly through Geneva on the same road, approached said curve; that before it reached the curve the driver did not and could not see the Ford car; that after the Ford car had rounded the curve, travelling at the rate of about 25 miles an hour, the driver did not see the Ford car in time to avoid a collision; and that a front part of the Ford car violently collided with a rear part of Plaintiff's automobile in three seconds or less with that of defendant's at issue in the question (a) whether the collision occurred a few feet beyond the curve or many feet beyond it where the road was straight; (b) whether or not the tail-light on the Ford car was burning at the time; and (c) whether or not the street lights on the road were lighted. As to the front light on the Ford car its driver, Lambert, testified on cross-examination that he did not see any car ahead of him until he was within 25 feet of the Ford car and that he then saw it because his "bright light" shone upon it, which light shone light about 20 or 25 feet, and that his front light had two beams, "one straight ahead and one down-hill."

The main contention of defendant's counsel is in substance that the jury's verdict is manifestly against the weight of the evidence on the question of defendant's negligence and Plaintiff's contributory negligence. He cannot agree with the

contention. We think that in view of all the evidence these questions were peculiarly within the province of the jury to determine, and that the verdict as to them should not be disturbed.

Defendant's counsel also contends that the court committed reversible error "in refusing to withdraw a juror and continue the case because of the deliberate act of plaintiff's attorney in bringing out the fact of defendant being insured." We find no substantial merit in the contention. The incident occurred while defendant's witness, Combs, was being cross-examined by plaintiff's attorney, but the record does not show that said attorney was to blame for the particular statement of the witness complained of. Furthermore, the record does not disclose that defendant's attorney obtained a ruling on his motion to withdraw a juror, or asked that the particular statement of the witness be stricken, or asked that the jury be instructed to disregard it. (See Williams v. Consumers Co., 352 Ill. 51, 55.)

Equally without merit, in our opinion, is defendant's counsel's further contention that the judgment should be reversed because of certain remarks of the trial court, claimed to be prejudicial to defendant. As it appears to us the remarks complained of were directed against plaintiff's attorney and were in no wise prejudicial to defendant.

It is finally contended (a) that the jury's verdict of \$12,500 was so excessive as to show passion and prejudice on their part, and (b) that even with the remittitur of \$4,000 the judgment of \$8,500 is excessive. Considering plaintiff's testimony and that of her two physicians, Drs. Forrester and Killeen, as to the nature, extent and permanency of her injuries, which was uncontradicted, we find no merit in either of the contentions.

The judgment against defendant of January 20, 1934, appealed from, should in our opinion be affirmed, and it is so ordered. Scanlan and Sullivan, JJ., concur.

contention. We think that in view of all the evidence shown questions were presented within the province of the jury to determine, and that the verdict as to them should not be disturbed. Defendant's counsel also contends that the court committed

reversible error "in refusing to withdraw a juror and appoint the case because of the defendant's statement of the attorney in effecting the fact of defendant being innocent." We find no error

essential merit in the contention. The incident occurred while defendant's witness, Gamba, was being cross-examined by plaintiff's attorney. But the record does not show that said attorney was so

biased that the particular statement of the witness complained of. Furthermore, the court does not believe that defendant's attorney obtained a ruling on his motion to withdraw a juror, or asked that the particular statement of the witness be stricken, or asked that the jury be instructed in accordance with the Illinois vs. ...

Ill. 282 Ill. 281, 282.

Specifically without merit, in our opinion, is defendant's counsel's further contention that the judgment should be reversed because of certain remarks of the trial court, alleged to be prejudicial in substance. As it appears to us the remarks complained of were simply remarks of the court and were in no way prejudicial to defendant.

It is finally contended (a) that the jury's verdict of \$12,500 was so excessive as to show passion and prejudice on their part, and (b) that even with the remission of \$4,000 the judgment of \$8,500 is excessive. Considering plaintiff's testimony and that of the two physicians, Drs. Twiss and Elliot, as to the nature, extent and permanency of her injuries, which are unquestioned, we find no merit in either of the contentions.

The judgment against defendant of January 20, 1934

appealed from, stands in our opinion as affirmed, and it is so ordered.

37507

ACORN BUILDING AND LOAN
ASSOCIATION, a corporation,
Appellant,

v.

CHARLES SPALENKA and
ANNA SPALENKA,
Appellees.

12 H
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

279 I.A. 617⁵

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the 1st class in assumpsit, commenced against defendants on July 26, 1933, upon their promissory note for \$6,000, dated January 26, 1931, there was a second trial before a jury at which much oral and written evidence was introduced by the parties. At the conclusion of all the evidence and upon defendants' motion the court, on December 15, 1933, directed the jury to find the issues against plaintiff and such verdict was returned. On January 5, 1934, a judgment for costs was entered against plaintiff, which by the present appeal it seeks to reverse.

The first trial before a jury was had under the original pleadings during November, 1933, resulting also in a directed verdict against plaintiff and the entry of a judgment for costs against it. Thereafter that judgment was vacated, plaintiff was given leave to file an amended statement of claim and defendants an amended affidavit of merits thereto, and the second trial was commenced on December 12, 1933.

Plaintiff's amended statement of claim is in the form of two special counts and the common counts. In each of the special counts the note sued upon is set out in full. In one special count it is averred in substance that on January 26, 1931, defendants

JOHN WILLIAMS AND LEO
ASSOCIATES, INC. (INCORPORATED)
Appellants

CHAS. E. WILLIAMS and
LEO WILLIAMS, JR.
Appellees

STATE OF TEXAS

COUNTY OF DALLAS

279 I.A. 617

MR. PRESIDING JUDGE DAVID BELLER, HIS CLERK ON THE DAY,

In an action of the last class in Williams, commenced

against defendants on July 26, 1933, upon their previous note

for \$5,000, dated January 12, 1931, there was a second trial

before a jury at which much oral and written evidence was intro-

duced by the parties. At the conclusion of all the evidence and

upon testimony taken the jury, as composed of 12, returned

the jury to find the issues against plaintiffs and each verdict

was returned. On January 2, 1934, a judgment for costs was entered

against plaintiffs, which by the present appeal is sought to reverse.

The first trial before a jury was not under the original

pleadings during November, 1933, resulting also in a directed ver-

dict against plaintiffs and the entry of a judgment for costs against

it. Thereafter the judgment was reversed. Plaintiffs now bring

leave to file an amended statement of claim and to introduce an amended

affidavit of merits thereto, and the second trial was postponed on

November 12, 1933.

Plaintiffs' amended statement of claim is in the form of

two special counts and the common count. In each of the special

counts the note upon which suit is set out in full. In one special count

it is averred as judgment was entered July 26, 1933, for costs

executed their note and "delivered the same to one John O. Bastear," whereby they promised to pay on or before one year after date to bearer the sum of \$6,000, with interest before maturity at the rate of 6% per annum, payable semi-annually, etc.; that on January 26, 1931, said Bastear "sold and delivered the note to plaintiff, for value and before maturity, and without giving any information to plaintiff as to the circumstances of its execution and delivery to said Bastear, and without plaintiff having any notice of any kind whatsoever of any defense which said defendants had or might have to a suit thereon by said Bastear against them;" and that the note became the property of plaintiff and has remained in its possession ever since. In the other special count it is averred in part that after the execution and delivery of the note to Bastear, he "negotiated" it to plaintiff, and plaintiff is now the owner thereof. In plaintiff's affidavit of claim, by its attorney, it is stated in substance that the nature of its demand is for money due and owing to it as the owner of said note; that no part of the note has been paid, and that there is now due thereon to plaintiff from defendants the sum of \$7,147.50.

In defendants' amended affidavit of merits they admitted their execution of the note, but denied that they delivered it to said Bastear individually, and alleged that they delivered it, with a trust deed, to him "as an officer, agent and director of plaintiff corporation." They further denied that on the day of its date Bastear negotiated it to plaintiff or that plaintiff is the legal holder and owner thereof; alleged that Bastear, in receiving it, "acted as an officer, agent and director of plaintiff;" denied that Bastear, at any time, sold and delivered it to plaintiff; and alleged that plaintiff gave no value for it and "is not an innocent holder thereof for value before maturity, or without knowledge of any

...delivered the same to one John O. ...
...they promised to pay on or before one year after date of ...
...the sum of \$5,000, with interest before maturity of the ...
...of \$5 per annum, payable semi-annually, viz., \$25 on January 1st ...
...and delivered the same to Plaintiff, for ...
...and before maturity, and without giving any ...
...as to the circumstances of its execution and delivery to ...
...and without Plaintiff having any notice of any kind ...
...of any defense which said defendant had or might have to ...
...suits thereon by said defendant against them; and that the note was ...
...the property of Plaintiff and has remained in the possession ...
...in the other special count is in evidence in part that ...
...after the execution and delivery of the note to defendant, he ...
...it to Plaintiff, and Plaintiff is now the owner thereof, ...
...of which, by its attorney, it is stated in ...
...the nature of the demand is for money due and owing ...
...of said note; that no part of the note has been ...
...and that there is now due thereon to Plaintiff from defendant ...
...the sum of \$7,117.00.

...affidavit of merit they submitted ...
...of the note, and denied that they delivered it to ...
...and alleged that they delivered it, with ...
...as an officer, agent and discover of Plaintiff ...
...They further denied that on the day of its date ...
...is to Plaintiff or that Plaintiff is the legal ...
...and some others alleged that defendant, in receiving it, ...
...as an officer, agent and discover of Plaintiff; denied that ...
...and delivered it to Plaintiff; and alleged ...
...no value for it and "is not an innocent holder ...
...or without knowledge of any

defenses," etc. They further alleged in substance

That on and prior to January 26, 1931, Bastear, as an officer, director and agent of plaintiff, "was engaged in negotiating and soliciting mortgages for and on behalf of plaintiff;" that he, acting as such officer and agent, "did negotiate with these defendants for the making of a loan by plaintiff on certain property owned by them, and did agree that plaintiff would loan to them the sum of \$6,000, provided that said loan was secured by a trust deed on defendants' property, - said money to be paid to defendants when the title had been brought down by the Chicago Title & Trust Co. and a guaranty policy issued, and that said note and trust deed were not to be considered as the obligation of defendants unless and until said title was so brought down, etc., and the money paid to them;" that relying upon said agreement and promise defendants executed said note and trust deed, and delivered them to Bastear, "who received them as the officer and agent of plaintiff;" that plaintiff, upon their receipt, "failed and refused to pay said sum of \$6,000 to defendants, and failed and refused to return upon demand the said note to them, - all with the intent to cheat and defraud them;" and that by reason thereof said note and trust deed "did not become an obligation of these defendants."

That on April 28, 1932, plaintiff promised to return said note to defendants provided that they would pay the bill of the Title & Trust Co. for said guaranty policy, etc.; that relying upon said promise defendants paid said bill; but that thereafter, in spite of plaintiff's said promise, it refused to return the note to defendants.

That a meeting of the "stockholders" of plaintiff corporation was held (time of meeting not stated), at which meeting said stockholders "adopted a resolution" to the effect that, "since plaintiff had not paid to defendants the amount of said note, the note should be cancelled and returned to defendants, and did by said resolution direct the officers of plaintiff corporation to return said note and trust deed to them;" but that in spite of the resolution plaintiff's officers have failed and refused to comply with the resolution or to return the note and trust deed to defendants.

That "no consideration ever was paid to defendants by plaintiff or any other person for said note;" and that defendants are not indebted to plaintiff in the sum of \$7,147.50, or in any other sum, on account of the note or otherwise.

On the trial the principal issue was whether or not plaintiff became a bona fide holder of the note before maturity in due course and for value, and without notice of any infirmity in the instrument or defect in the title of Bastear to whom it was originally delivered. On this issue the evidence introduced by the respective parties is in irreconcilable conflict, but, after considering the mass of oral and documentary evidence, we are of the opinion that such evidence as was offered by plaintiff and admitted by the court, standing alone, was sufficient to have warranted a jury in returning

[illegible]

There is no doubt that the above information was obtained from the confidential source who provided the information to the FBI. The source is a person who has been in contact with the subject of this investigation for a number of years. The source has provided reliable information in the past and is being provided to you for your information.

[illegible]

That a meeting of the "Association" of Plaintiffs was held on June 1, 1964, at which meeting the following resolution was adopted: "Resolved, that the Association of Plaintiffs be authorized to request the Federal Bureau of Investigation to conduct an investigation of the activities of the Association of Plaintiffs and to report the results of such investigation to the Association of Plaintiffs." The resolution was adopted by a vote of 10 to 0.

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR
CONCLUSIONS OF THE NATIONAL BUREAU OF STANDARDS
AND IS NOT INTENDED TO BE USED IN LEGAL PROCEEDINGS.

...and the fact that the ...

On this issue the evidence introduced by the respective witnesses is in substantial agreement, but, after examining the

...and of oral and documentary evidence, we are of the opinion that
...and evidence as was offered by Plaintiff and admitted by the Court,
...setting aside, we conclude it does warrant a jury in reasonable

a verdict in plaintiff's favor. And the record discloses that other evidence was offered by plaintiff (refused admission by the court) tending to sustain its theory that it became a holder of the note in due course. And we are further of the opinion that the court erred in not submitting the case to the jury, in directing a verdict for defendants, and in entering the judgment against plaintiff upon the verdict, and that the judgment should be reversed and the cause remanded for another trial. As the case may be tried again we refrain from a discussion of the evidence.

In Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213, it is said (*italics ours*):

"When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record, which, standing alone, is sufficient to sustain such a verdict, but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied. * * To hold otherwise is to deny to plaintiff the right of trial by jury. There may be in a record evidence which, standing alone, tends to prove all the material averments of the declaration, and which is therefore sufficient to support, warrant or sustain a verdict in favor of plaintiff, and yet, upon the whole record, the evidence may so preponderate against the plaintiff that a verdict in his favor cannot stand when tested by a motion for a new trial."

See, also, Allen v. U. S. Fidelity Co., 269 Ill. 234, 243; Chicago City Ry. Co. v. Martensen, 198 id. 511, 512. In the Martensen case it is said (*italics ours*):

"And we have decided very many times that on a motion to take a case from the jury, either at the close of plaintiff's evidence or at the close of all the evidence, the naked legal question thereby raised in this court is whether or not there is any evidence in the record fairly tending to support the plaintiff's cause of action. It is never a question of the weight of the testimony. It would be useless to attempt to reiterate the reason for this rule. If, as contended by counsel for appellant, the trial court may, at the close of all the evidence, take a case from the jury merely because as regards the clear preponderance of the evidence, - or the overwhelming preponderance of the evidence, - as being in favor of the defendant, then the right of trial by jury is left to the judgment and discretion of the court; and no one would seriously insist upon such a rule."

The judgment of the Municipal court of January 5, 1934, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Malan and Sullivan, JJ., concur.

[illegible]

is now (please note)

[illegible]

... (faint text) ...

[illegible]

1. The location of the building is in the city of New York, in the County of New York, in the State of New York.

37293

K. BLANKSTEIN,
Defendant in Error,

v.

ALBERT J. MORAN, Bailiff of the
Municipal Court of Chicago, and
WILLIAM KLEINE, Doing Business as
LOYOLA GARAGE,
Plaintiffs in Error.

13 7
ERROR TO MUNICIPAL

COUNT OF CHICAGO.

279 I.A. 618¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A tort action. In a trial by the court both defendants were found guilty as alleged in plaintiff's statement of claim and plaintiff's damages were assessed in the sum of \$650. A joint judgment was entered against defendants in that sum. This writ of error followed.

Plaintiff rented an apartment to one Charles Harris, and on March 29, 1933, there being due her an arrearage of rent in the sum of \$220, she caused the seizure of certain personal property of Harris under the authority of a distress warrant, and upon the same day a custodian appointed by plaintiff removed said personal property, which included a Chevrolet automobile, to the Loyola garage, operated by defendant Kleine. The inventory made by the custodian failed to include, as part of the property distrained, the automobile. A distress suit was filed in the Municipal court of Chicago by plaintiff against Harris. On April 10, 1933, Harris filed a replevin suit in said court against plaintiff, John Doe, Mary Roe and defendant Kleine, doing business as Loyola Garage, for the recovery of the possession of the automobile in question and other personal property. On the same date, a

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replevin writ was issued, which was received on April 11, 1933, by defendant Moran, bailiff of the Municipal court, who executed the writ on April 14, 1933, by serving it on defendant Kline, doing business as Loyola Garage, with the result that the automobile was held by Kline subject to the order of the tenant, Harris, pending the disposition of the replevin suit. On April 15, 1933, in the distress suit, upon motion of plaintiff, she was given leave to amend the distress inventory on its face, nunc pro tunc, as of March 30, 1933, so as to include in the inventory "One Chevrolet Sedan." On May 20, 1933, an order was entered in the replevin suit finding right of property in Harris, plaintiff in said cause, but that the said property was held by the defendant in that suit, K. Blankenstein, plaintiff herein, for the payment of the sum of \$220; that Harris pay to plaintiff, within ten days, the sum of \$220 and interest; that if payment should be so made, Harris should retain the property replevied, but that in default of payment plaintiff in the instant suit should recover possession of the property from Harris and that a writ of retorno habendo should issue for said return. After the service of the replevin writ but prior to the entry of the judgment in that case, plaintiff presented, at the Loyola garage, a claim check for the automobile and demanded the return of the car, which was refused upon the ground that the car was then being held for the bailiff, under the writ, and that therefore they could not deliver the car to plaintiff. Plaintiff offered evidence to the effect that prior to the execution of the replevin writ the bailiff was apprised of the existence of the distress claim.

Plaintiff contends that "this court cannot properly pass upon the question of liability or non-liability of these defendants since the record shows they submitted no written propositions of law to the trial court. For this reason the judgment of the trial

registrar with was issued, which was received on April 11, 1933, by defendant Brown, bailiff of the Municipal court, who presented the writ on April 14, 1933, by serving it on defendant Blahut, being business as Tokyo Garage, with the result that the writ was held by Blahut subject to the order of the court, pending the disposition of the registrar writ. On April 15, 1933, in the district court, upon motion of plaintiff, she was given leave to amend the district inventory on the facts, and was ordered to amend the same to include in the inventory "the contents of the safe". On May 20, 1933, an order was entered in the registrar writ, finding right of property in Blahut, plaintiff in said writ, and that the said property was held by the defendant in said writ, to the extent of the payment of the sum of \$100.00, and that the said property should be returned to the plaintiff, and that in default of payment plaintiff in the instant writ should recover possession of the property from Blahut and that a writ of replevin should issue for said return. After the service of the registrar writ and prior to the entry of the judgment in that case, plaintiff presented at the Tokyo Garage a check from the American National Bank for the sum of \$100.00, which was returned upon the ground that the car was then being held for the plaintiff, under the writ, and that therefore they could not deliver the car to plaintiff. Plaintiff offered evidence to the effect that prior to the execution of the registrar writ the plaintiff was agent of the defendant of the district claim.

Plaintiff contends that "this court cannot properly pass upon the question of liability or non-liability of these defendants since the record shows they submitted no written propositions of law to the trial court. The said reason the judgment of the trial

court should be affirmed." There is no merit in this contention. It is the settled law of this state that it is our duty to determine whether the judgment is in accordance with the law and the evidence, even though no propositions of law were submitted to the trial court. (See P., C., & St. L. Ry. v. Chicago Ry., 300 Ill. 162; Central Trust Co. v. Hagen, 249 Ill. App. 507.)

Defendants contend "a judicial officer is protected by a writ of replevin describing specific property which has been duly issued and which is regular upon its face; hence the bailiff committed no tort by execution of the writ of replevin in this case." This contention is a meritorious one. In Samuel v. Broadwell, 87 Ill. 617, 619, the court quotes, with approval, the following:

"In Wilmarth v. Burt, 7 Metc. 257, Shaw, Ch. J. says: 'As a general rule, the officer is bound only to see that the process which he is called upon to execute is in due and regular form, and issues from a court having jurisdiction of the subject. In such case he is justified in obeying his precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law, that he should be so.' 'It is incomprehensible,' says Lord Kenyon, in Belk v. Broadbent, 3 T. R. 185, 'to say that a person shall be considered as a trespasser who acts under the process of the court.'"

(See also Boyden v. Frank, 20 Ill. App. 169, 173-5, wherein a number of authorities bearing upon the subject are cited; see also Gilbert v. Buffalo Bill's Wild West Co., 70 Ill. App. 326, 328-9.) Many decisions of the sister states supporting the rule laid down by our courts might be cited, if it were necessary. It must be borne in mind that in the instant case plaintiff does not claim that the writ of replevin was void nor that the Municipal court was without jurisdiction to issue the same. The writ was regular upon its face and the Municipal court had full jurisdiction in the premises, and the only knowledge that came to the bailiff related to the merits of the cause of action in the replevin suit. As stated in Watson v. Watson, 9 Conn. 140, and State v. Weed, 21 N. H. 262, an officer cannot assume judicial functions and decide questions judicial in character. Parties are entitled to a trial before the court

and an officer holding a writ or a warrant is not liable for its execution although he knows that the plaintiff or complainant will be unable to make out his case or even that the case is not prosecuted in good faith. The cases cited by plaintiff do not apply to the facts of the instant case.

It is unnecessary for us to consider defendants' contention that, under the facts of this case, defendant Kleine was fully justified in refusing to turn over the automobile to plaintiff, for even if the facts made out a prima facie case against him it was the settled law of this state that a joint judgment against several defendants could not be reversed as to one and affirmed as to others. As we have held that there was no liability on the part of the bailiff, the judgment, therefore, must be reversed as to both defendants. (See Livak v. Chicago & Erie R. R. Co., 209 Ill. 218, 226.) In connection with this ruling as to defendant Kleine, it must be remembered that the instant case was tried in 1933 and the present Practice Act did not take effect until January 1, 1934.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

37424

FIRST NATIONAL BANK AND TRUST
COMPANY (of Fargo, North Dakota),
a corporation,

Appellant,

v.

BAKER, FENTRESS & COMPANY, a
corporation, CONTINENTAL ILLINOIS
BANK AND TRUST COMPANY, a corporation,
individually and as depository under
an agreement between it and Joseph
A. Auchter et al., dated May 31, 1929,
COEUR D'ALENE PINE COMPANY, a
corporation, JOSEPH A. AUCHTER,
HENRY R. CHAFFY, JAMES FENTRESS,
AUSTIN JENNEN and L. F. STEVENSON,
Appellees.

279 I.A. 618²

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Complainant filed its bill against defendants and after answers had been filed by all of the defendants the cause was referred to a master in chancery upon a stipulation of facts. The master filed a report recommending that the bill be dismissed for want of equity. The chancellor confirmed the report and entered a decree dismissing the bill for want of equity. Complainant appeals. Defendant Continental Illinois Bank and Trust Company was dismissed out of the case by stipulation. No question is raised as to the pleadings.

The master found from the stipulation of facts, the following: That complainant was a corporation organized and existing under the national banking laws of the United States; that prior to, and for some time after April 1, 1925, the Coeur D'Alene Mill Company of Coeur D'Alene, Idaho, a corporation (hereinafter called Mill Company), owned large tracts of timber land, approximating 35,000 acres, and a certain saw mill, all

located in the state of Idaho, from which lands it was cutting and marketing large quantities of timber; that Fred Herrick was the president of said corporation and its principal stockholder, and E. W. Miller, its secretary and treasurer; that Herrick and Miller were its principal managing officers; that defendant Baker, Ventress & Company was "engaged in the financing of diverse and sundry timber corporations, association and organizations, the marketing and the selling of bonds and mortgages secured by timber lands or timber properties;" that about April 1, 1925, Herrick, Miller and Mill Company, being indebted in the sum of \$800,000, executed and delivered to Baker, Ventress & Company their joint and several obligations, "which were first mortgages 6 1/2 per cent serial Gold Bonds in denominations of \$1000, \$500 and \$100," whereby they and each of them jointly and severally agreed to pay to the holders and owners of the bonds \$50,000, absolutely and unconditionally, on April 1, 1926, and a like sum on the same day of each year thereafter to and including the year 1934, and \$350,000 on April 1, 1935, together with interest on all of said sums at 6 per cent, payable semi-annually; that to secure the payment of the bonds Mill Company executed and delivered its trust deed or mortgage, whereby it conveyed to Exchange National Bank of Spokane, Washington, and Calvin Ventress, as trustees, the said saw mill plant and the 35,000 acres of timber lands, together with certain water rights, railroads and other privileges and franchises; that Baker, Ventress & Company offered the bonds for sale, through its sales organization and through banks and other bond houses, and the entire issue of the bonds was thus sold; that about May 1, 1926, complainant purchased, in the open market, ten of the bonds of the face value of \$1,000 each for approximately \$10,000 and accrued interest; that prior to June 14, 1929, Mill Company, Herrick and Miller paid \$150,000 face value of the bonds,

located in the State of Idaho, from which lands it was holding and
maintaining title pursuant to deed; that the Nevada and the
present of said corporation and the principal stockholders, and
M. W. Miller, its secretary and treasurer; that Nevada and Miller
were the principal managing officers of the Nevada and Miller
a company was organized in the State of Idaho and under the
provisions, constitution and organization, the Nevada and the
selling of bonds and mortgages secured by timber lands or timber
interests; that Nevada and Miller, Nevada, Miller and Miller
Company, being indebted in the sum of \$200,000, executed and delivered
to Baker, Nevada & Company their joint and several obligations,
"which were first mortgage of the said Nevada and Miller in certain
parcels of \$100,000, \$50,000 and \$50,000," whereby they and each of them
jointly and severally agreed to pay to the holder and owners of the
bonds \$20,000, absolutely and unconditionally, on April 1, 1925, and
a like sum on the same day of each year thereafter so long as the same
the year 1925, and \$20,000 on April 1, 1926, together with interest
on all of said sums at a per cent, payable semi-annually; that to
secure the payment of the bonds Miller Company executed and delivered
the first mortgage of Nevada, Nevada & Company to Nevada and Miller
Bank of Spokane, Washington, and Civil Bank, in Trust, the
said bank and the \$2,000 notes of timber lands, together
with certain water rights, railroads and other privileges and
franchises; that Baker, Nevada & Company offered the bonds for
sale, through the sales representative and trustee James and other
bondholders, and the entire issue of the bonds was then sold; that
about May 1, 1925, completed payment, in the open market, of
of the bonds of the face value of \$1,000 each for approximately
\$12,000 and interest thereon, that prior to May 1, 1925, Miller

and paid to complainant and other holders interest on the bonds maturing on and prior to October 1, 1928; that at the time of the default hereinafter mentioned there were outstanding \$650,000 of the bonds, which included the bonds owned by complainant; that on March 28, 1929, Baker, Wentress & Company forwarded to complainant and other holders of the bonds a printed notice. The master here includes in his report the notice, which, in substance, informed the bondholders that default would occur in the payment of the principal and interest due April 1, 1929, due primarily to the fact that Herrick, the chief stockholder of the company and one of the joint makers of the bonds, "had failed financially." The notice also states certain facts and circumstances that led up to the failure and various efforts made by Baker, Wentress & Company to work out the situation without disturbing the bond issue. The notice then proceeds as follows:

"We are faced with the problem of determining the best method of protecting the first mortgage debt, which, as nearly as we can now determine, aggregates about \$700,000, including interest, unpaid taxes, insurance, expenses, etc. We believe the first step is to get title to the mortgage property through foreclosure, thereby eliminating the claims of all other creditors relative thereto; and that the outstanding bonds and coupons should be used to buy in the property at the foreclosure sale, in case no one else bids sufficient thereto to pay off the mortgage debt, including interest and costs. Such a suit will soon be instituted. A year for redemption after the sale is allowed under Idaho law.

"You will soon receive a draft of an agreement creating a Bondholders' Protective Committee. If the committee should become the purchaser of the property at such foreclosure sale, we recommend that as soon as it acquires good title thereto, it should attempt promptly to sell the property for cash as a whole, for an amount sufficient to pay the mortgage debt; or, failing this, to sell it on terms to some experienced operator willing to take over the operation and work out the mortgage debt on a basis satisfactory to the security holders. In brief, to provide a live obligation as soon as possible.

"Our stockholders, their families and immediate connections hold approximately one-fifth of the \$650,000 of bonds now outstanding. We will neither buy nor sell these bonds at the present time. You may be assured that we will exert our best efforts to work out this situation satisfactorily and as speedily as possible, and we count on your fullest co-operation to this end."

The master further found that about May 31, 1929, "at the request of Baker, Fentress & Company, James A. Auchter, Henry F. Chaney, James Fentress, Austin Jenner and L. F. Stevenson as a bondholders protective committee entered into a Bondholders Protective Agreement, which Agreement is in evidence;" that about that date a copy of the agreement and a notice were forwarded to complainant and other holders of the bonds; that complainant received copies of the notice and the agreement and "accepted the terms of said depository agreement and * * * forwarded to the Continental Illinois Bank and Trust Company its bonds as aforesaid, and on * * * June 14, 1929, deposited with the Continental Illinois Bank and Trust Company its bonds as aforesaid, * * * and that * * * Continental Illinois Bank and Trust Company issued and delivered to complainant its certificate of deposit thereunder * * *. That of the \$650,000 of bonds outstanding \$645,000 thereof (including complainant's) were deposited with said depository and like certificates of deposit issued therefor;" that thereafter Calvin Fentress, as trustee of the mortgage securing the bonds, instituted a foreclosure suit in Idaho against Mill Company and others for the foreclosure of the mortgage or trust deed given to secure the bonds, and in 1929 Mill Company was adjudicated a bankrupt and J. A. McGovern was elected and qualified as trustee in bankruptcy of the estate of Mill Company; that on June 2, 1930, Fentress, on behalf of Auchter et al., as the Protective Committee, purchased from McGovern, trustee, all the right, title and interest of Mill Company in and to the 38,000 acres of timber land, saw mill, water rights, railroad, and certain other franchises and privileges, which were all conveyed to Fentress as trustee for said Committee; that in November, 1930, Chaney and Fentress made a deed conveying to Occur D'Alene Pine Company, a Delaware corporation, the properties conveyed to them by said

sheriff's deed and said trustees' deed; that about October 4, 1930, said Protective Committee forwarded to complainant and other persons who had deposited bonds, a certain notice; that complainant, after receiving it, forwarded to the Protective Committee its protest in writing; that notwithstanding the protests of complainant the Protective Committee thereafter caused a corporation to be organized under the laws of the state of Delaware, known as the Occur D'Alene Pine Company, with an authorized capital of 9,000 shares of common stock of the par value of \$100 each, and 1,400 shares of preferred stock which have not been issued; that the officers and directors of said corporation were the members of the Bondholders' Protective Committee, C. E. Widdall, the office manager of Baker, Fentress & Company, and his assistant, Ramsey Webster; that the deed from Chaney and Fentress to Occur D'Alene Pine Company was made in consideration of \$860,000 par value of its common stock, 75 per cent fully paid and 25 per cent unpaid, and \$38,470.28 evidenced by the grantee's promissory note which represented moneys which the committee had borrowed to pay the expenses of the foreclosure, including the amount distributed to the \$5,000 par value of bonds not deposited with it; that thereupon the \$860,000 of said common stock was issued to the holders of the certificates of deposit issued by the depository of said committee, "to each certificate holder a certificate for 133-1/3% of the par value represented by their respective certificates of deposit. These certificates were delivered to the Continental Illinois Bank and Trust Company which in turn delivered them in exchange for the certificates of deposit, but complainant did not exchange the certificate of deposit issued in its name for said stock;" that at the same time the directors of Occur D'Alene Pine Company adopted the following resolution:

should be used and said trustees, hereby and about 1910-11, 1912, said Trustee Committee, in compliance with the
persons who had deposited bonds, a certain number, and consequently
after receiving it, referred to the Trustee Committee for pro-
cess in writing; that notwithstanding the protest of complainant
the Trustee Committee thereafter caused a corporation to be
organized under the laws of the State of Illinois, known as the
Trust of Illinois Trust Company, with an authorized capital of \$1,000,000
shares of common stock of the par value of \$100 each, and 1,000,000
shares of preferred stock which have not been issued; that the
officers and directors of said corporation were the members of the
Trustee Committee, J. W. Hildahl, the chief
manager of Baker, Kerkness & Company, and his assistant, Henry
Reborek; that the laws from Chicago and Wisconsin to cover Illinois
the company was made in consideration of \$100,000 per value of the
common stock, 75 per cent paid and 25 per cent unpaid, and
the company was authorized by the trustee's promissory note which
represented money which the committee had borrowed to pay the
expenses of the corporation, including the costs of interest on
the \$1,000,000 per value of bonds not deposited with it; that throughout
the \$1,000,000 of said common stock was loaned to the holders of the
certificates of deposit issued by the company of said committee,
the said certificates being a guarantee for \$100,000 of the par
value represented by their respective certificates of deposit. These
certificates were delivered to the Commercial Illinois Bank and
Trust Company which is now delivering them in exchange for the
certificates of deposit, but complainant did not exchange the
certificates of deposit issued in the name for said stock; that
as the name of the directors of Commercial Illinois Trust Company is stated
the following certificate:

"Be It Further Resolved, that in the judgment of this Board said property is necessary for the purposes of the corporation; the same is the full consideration of the issue of said stock, 75% paid and non-assessable and the directors decree and adjudge that said property is of the value of \$617,000."

Also the following resolution:

"Be It Further Resolved that this corporation will bring no suit and assert no personal liability against any holder of such stock certificates of stock for the collection of unpaid portion thereof."

That on November 12, 1930, Coeur D'Alene Pine Company mailed to each holder of the certificates issued by the Continental Illinois Bank and Trust Company as depository of Bondholders' Protective Committee, a call for the payment of 7½ per cent of the par value of the stock and a call for a stockholders' meeting; that in the same communication there was contained the following notice:

"This company will bring no suit and assert no personal liability for any unpaid calls, but will look to the remedies against the stock itself for collection."

That on the back of the communication certain sections of the general corporation law of Delaware were printed, and also the following:

"The Coeur D'Alene Pine Company in issuing this stock has agreed not to bring suit and not to assert personal liability against holders but to look only to the stock for collection of the calls."

That complainant, in response to this communication, sent a letter stating that it could not and would not accept the stock, protesting against the assessment mentioned, and objecting to the entire plan; that on February 25, 1931, complainant received a communication from Coeur D'Alene Pine Company which notified it that it was the holder of 133-1/3 shares in the said company and that there was an unpaid assessment of \$1,000; that the Coeur D'Alene Pine Company would, on March 18, 1931, proceed to sell at public sale such part of the shares "of each of said delinquent stockholders as will pay said call, with interest and incidental expenses and will transfer the shares so sold to the respective purchasers who will then be entitled to certificates therefor;" that upon receipt of this

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This on October 18, 1960, when I was in the hospital.

Revised at the discretion of the Controller of the Revenue

...continued on page 2

There will be no further action on this matter.

religionists were not in such serious 'prejudicial' view as the

There was evidence that the following factors

"This company will bring no aid and comfort to Germany
 liability for my unpaid bills, but will look to the receiver
 against the stock itself for collection."

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THESE RESULTS ARE IN AGREEMENT WITH THE CONCLUSIONS OF OTHER STUDIES.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

...and the

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

NO. 6 FROM MEMPHIS TO NEW YORK BY AIR MAIL FIRST CLASS

and the following information:

communication complainant again protested, and the sale was postponed from time to time by an agreement between the parties; that at the time of the foreclosure of the mortgage and the said sale of said property to Coeur D'Alene Pine Company, "the complainant was the holder of 10/645ths of the entire bonded indebtedness. That the fair value of complainant's equitable interest in said property of November 1, 1930 was 10/645ths of said sum of \$217,000, which was the value of said property as offered by the trustees and the Coeur D'Alene Pine Company in the transfer of said property to said corporation or \$9,255.82;" that upon the call for the payment of 7½ per cent of the face or par value of the stock, the holders of all of the stock except about 1,375 shares immediately paid said assessment and before the sale occurred the number of shares upon which the assessment had not been paid had been further reduced to 869 shares; that since November 1, 1930, Coeur D'Alene Pine Company has undertaken no operation whatever; has made a second call upon its stockholders, and from the two calls has realized the sum of \$101,132, and with the approval of both directors and stockholders, dismantled the mill originally covered by the mortgage, thereby reducing insurance and eliminating the expense of caretakers; has ceased to pay taxes on 11,450 acres of land regarded as valueless; has sold 5,471 acres of land for \$63,960; has paid all of its debts, and on December 31, 1932, had \$29,945.31 in its treasury to defray the carrying charges for the year 1932, which were estimated at \$23,515. The report continues: "It is contended on behalf of the complainant, that the amendment to Section 12 of said Bondholders' Protective Committee agreement, by adding the following: 'Such capital stock may be issued as in part unpaid, and to that extent payable on the call of the Board of Directors,' was not binding upon the complainant by reason of the protest made by it to

said amendment. It is further contended that the only power said Bondholders' Committee had, was to supply deficiencies in the original agreement that would necessarily carry out the original intent of the parties, and that the provision regarding amendments was not intended as an authority to permit modification of the plan that would definitely strike out the original undertakings of the parties; that said original agreement expressly provided 'registered holders of certificates of deposit shall not be personally liable for such compensation, expenses or indebtedness, or for any action taken by the Committee;' that the altered plan as adopted imposes a contingent stockholders' liability upon those who accept the stock; that the complainant, being a National Bank, is prohibited from entering into any stock venture whereby it would become liable to assessment on the stock. The complainant further contends that the Bondholders' Protective Committee were trustees for the benefit of all the bondholders; that as such trustees, they were bound by the terms of such agreement so long as they continued to act, and that they had no power to amend the agreement after the sale; that having used complainant's bonds for the purchase of the mortgaged premises on a plan materially different from the one in force at the time of the sale, the defendant, as members of the committee and the new corporation as a purchaser with notice, are liable to the complainant for the face value of the bonds and interest coupons, with interest thereon. On behalf of the defendants it is contended that the defendants who constitute the Protective Committee acted in good faith, with an honest desire to do what was best for the interests of all concerned. That the complainant has not proven any fraudulent, collusive or wrongful conduct on the part of any of the defendants, and that on the contrary, the acts, conduct and proceedings of the defendants, as shown in the pleadings

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and exhibits and by the facts stipulated, indicate thorough impartiality toward former bondholders of the Coeur D'Alene Pine Company, and that the complainant has at all times had due notice of all plans. That the defendants who constitute the Protective Committee in all respects acted within the scope of their agency as created and defined by the Protective agreement and the amendment thereof. That under the terms of the protective agreement, the depositors submitted themselves to the control of the majority, including the right to amend the agreement in any way that was germane to the original agreement. That the amendment was duly and regularly adopted by a majority of the depositors of the bonds, and that it was in all respects germane to the plan and purposes of the agreement. That said committee had the power to issue the assessable stock without the sentence added by the amendment, but if it did not have such power without the amendment, it certainly had it by reason of the added sentence. That the terms of the original agreement are being carried out and that therefore complainant has not suffered any damages and the bill of complaint should be dismissed. The Master finds that under the terms of said original agreement, said Bondholders' Protective Committee had the power, whenever in its judgment it might be advisable, and from time to time, to amend the said agreement and that unless within a period of fifteen (15) days from the mailing of notice of any amendment, the registered holders of certificates of deposit representing more than 50% of the aggregate principal amount of the deposited bonds or coupons, filed with the depository, written notice of dissent, or if at any time within the period, registered holders of such certificates of deposit, representing 51% of the aggregate principal amount of the deposited bonds and coupons, filed with the depository written notice of their consent to

and exhibits and by the facts admitted, including the
 important facts, however, the fact that the Government
 Company, and that the Government has at all times had the right
 of all kinds. That the Government has the right to
 Committee in all respects and within the scope of their
 as created and defined by the protective agreement and the amendment
 thereof. That under the terms of the protective agreement, the
 depositors submitted themselves to the control of the majority,
 including the right to amend the agreement in any way that was
 germane to the original agreement. That the amendment was duly
 and regularly adopted by a majority of the depositors of the bonds,
 and that it was in all respects germane to the plan and purposes
 of the agreement. That said depositors had the power to amend the
 agreement over which the Government had no control, and
 it did not have such power without the amendment, it certainly
 had it by reason of the stated sentence. That the terms of the
 original agreement are being carried out and that the Government
 Plaintiff has not suffered any damage and the bill of complaint
 should be dismissed. The Master finds that under the terms of
 said original agreement, said depositors, including the
 had the power, whenever in the judgment it might be advisable, and
 from time to time, to amend the said agreement and that under
 within a period of fifteen (15) days from the mailing of notice of
 any amendment, the registered holders of certificates of deposit
 representing more than 50% of the aggregate principal amount of
 the deposited bonds or coupons, filed with the depositary, within
 notice of dissent, or at any time within the period, requested
 holders of such certificates of deposit, representing 50% of the
 aggregate principal amount of the deposited bonds and coupons,
 filed with the depositary within fifteen (15) days of the

such amendment, then in either case would such amendment be binding upon all the holders of certificates of deposit. The complainant who owns 10/650ths of the face value of all the bonds, is the only party to said agreement that is now objecting to the method pursued by the said Bondholders' Committee in carrying out the reorganization plan. Even though the amendment to said Section 12 materially changed the terms of the original agreement, said amendment was valid and binding on the various holders of the certificates of deposit, unless 60% of such holders objected thereto in accordance with the provisions of said agreement. The complainant being the only objector, and owning only 10/650ths of the face value of said bonds so deposited, is bound by the said agreement and the fact that the complainant is a National Bank and prohibited from entering into any venture which might make it liable to assessment on the stock, cannot be considered because there is no claim^{made} against the complainant for the recovery of any stock liability. The defendants are merely seeking to enforce the assessment levied against the stock apportioned to the defendant and which has not been paid in full. The Master further finds that the Bondholders' Protective Committee was faced with either forcing the sale of the property given to secure said bond issue at a sacrifice price, or holding it until such time as it could be sold for a more reasonable price. The plan adopted by the Bondholders' Committee appears to be for the equal benefit and protection of all of the bondholders and shows that the Committee acted in absolute good faith." The master recommended that the bill be dismissed for want of equity.

The Bondholders' Protective Agreement contained, inter alia, the following:

"(6) The Committee may supply defects and omissions in this Agreement and may make such modifications as in its judgment may be deemed necessary or proper to carry out the same properly and effectively; and its judgment as to expediency or

such agreement, then in effect there would have been no binding upon all the holders of certificates of deposit. The Commission also was 10/25/36 of the face value of all the bonds, is the only party to said agreement that is now objecting to the method proposed by the said bondholders' Committee in carrying out the recommendations. Even though the agreement to sell bonds is not binding changed the terms of the original agreement, said agreement was valid and binding on the various holders of the certificates of deposit, unless 50% of such holders objected thereto in accordance with the provisions of said agreement. The Commission being the only objector, and owning only 10/25/36 of the face value of said bonds as deposited, is bound by the said agreement and the fact that the Commission is a National Bank and registered from entering into any venture which might make it liable to agreement on the stock, cannot be considered because there is no claim against the Commission for the recovery of any such liability. The bondholders are merely seeking to enforce the agreement they signed against the stock deposited to the defendant and which has not been paid in full. The Court further finds that the bondholders' Committee was faced with either forcing the sale of the property given to secure said bond issue at a sacrifice price, or holding it until such time as it could be sold for a more reasonable price. The plan suggested by the bondholders' Committee appears to be for the equal benefit and protection of all of the bondholders and shows that the Committee acted in a spirit of equity. The Court is satisfied that the bill be dismissed for want of equity.

The bondholders' Committee, however, advised that the following:

"(c) The Committee may supply between and among the holders of this agreement and may make such modifications as in the judgment may be deemed necessary to carry out the purposes of the agreement and the judgment as to expediency in properly and effectively carrying out the purposes of the agreement."

necessity shall be final. The Committee shall also have the power, whenever in its judgment it may be advisable and from time to time, to amend this Agreement. All amendments shall be filed with the Depository. If it be the judgment of the Committee, which shall be conclusive, that any such amendments will materially effect the rights of the holders of certificates of deposit, notice of such filing and of the nature of such amendments shall be given to such holders by United States registered mail at their last known addresses. Unless within a period of fifteen days from the mailing of such notice, registered holders of certificates of deposit representing more than fifty per cent of the aggregate principal amount of the deposited Bonds and coupons file with the Depository written notice of dissent, or if at any time within said period, registered holders of certificates of deposit, representing fifty-one per cent of the aggregate principal amount of the deposited Bonds and coupons shall file with the Depository written notice of their consent to such amendments, then in either case such amendments shall be binding on all holders of certificates of deposit; and all of them shall be finally and conclusively deemed for all purposes to have assented to said amendments whether they received actual notice or not, and shall be irrevocably bound and concluded by the same, and this Agreement shall be modified accordingly.

* * *

"(8) The Committee shall have a first lien on all deposited Bonds and coupons, and on all property which it may purchase, acquire or hold, or which may come into its hands, for compensation and expenses (including the compensation and expenses of the Depository and of such counsel, agents and employees as it may select) and for any and all indebtedness incurred by the Committee. Registered holders of certificates of deposit shall not be personally liable for such compensation, expenses or indebtedness, or for any action taken by the Committee.

* * *

"(11) The full legal and equitable title to all deposited Bonds and coupons and any property received hereunder shall, for all the purposes hereof, vest in the Committee immediately upon the deposit thereof hereunder, but the Depositors respectively agree at any time or times, on demand of the Committee, to execute and deliver to the Committee any and all other transfers, assignments and authorizations required by the Committee to evidence the vesting of the ownership of said Bonds and coupons in the Committee or its nominees. The Committee shall have and may exercise, in its discretion, all rights and powers of the respective owners or holders of said Bonds and coupons deposited hereunder. Immediately upon the deposit of their Bonds and coupons hereunder, all right, title and interest, legal and equitable, of the Depositors in and to the money now or hereafter in the Sinking Fund provided for in said Mortgage shall vest in the Committee; and the Depositors, so far as they lawfully can, hereby authorize the Trustee under said Mortgage to turn such Sinking Fund moneys over to the Committee, or to pay the same, in whole or in part, upon its order.

"(12) Without limiting the other provisions hereof, the Depositors fully authorize the Committee, in its discretion:

"(a) To foreclose said Mortgage; and, if the Committee deems it necessary or advisable, to purchase the mortgaged property at the foreclosure sale, using in payment therefor the Bonds and coupons outstanding under said Mortgage in accordance with Sections 11 and 12 of Article V of said Mortgage (to which reference is hereby made), and also using said Sinking Fund moneys (if any) for the purpose of making such payment and for the purpose of paying the costs and expenses incident to such sale or incurred hereunder by the Committee;

"(b) In case of purchase by the Committee at such foreclosure sale, to dispose of the mortgaged property in such manner and for such price and upon such terms and conditions as the Committee may deem advisable; or, if no such sale is in prospect by the time the title to the mortgaged property, free of redemption, is thus acquired by the Committee, to organize a new corporation to acquire title thereto and distribute its capital stock or securities ratably among the Depositors.

"* * *

"(g) To do or cause to be done whatever the Committee, in its discretion, may deem expedient to preserve, protect or enforce the rights and interests of the Depositors, in such manner and on such terms as the Committee shall think proper; to enforce by legal proceedings or otherwise, in respect to the deposited Bonds and coupons, all powers vested in or conferred upon the owners and holders thereof by the terms of said Mortgage or otherwise; and, in general, to execute such papers and to do such acts as the Committee, in its discretion, may deem proper in order to carry out fully and effectively the purposes of this Agreement."

The Bondholders' Protective Committee amended clause (b) of section (12) by adding to it the following words: "Such capital stock may be issued as in part unpaid and to that extent payable on the call of the Board of Directors."

Complainant states that "this attempted amendment is the crux of the whole matter," and contends: "I. The bondholders' protective committee had no power to amend the bondholders' protective agreement after the sale of the mortgaged premises," and "II. The defendants had no authority under the bondholders' protective agreement: (a) To organize a corporation with assessable stock. (b) To attempt to waive the personal liability to the corporate creditors for the assessable portion of the stock. (c) To require a national bank bondholder to accept assessable stock in lieu of its securities."

"(a) To purchase said mortgage; and, if the Committee deems it necessary or advisable, to purchase the mortgage property at the foreclosure sale, using in payment thereof the funds and corporate assets held under said mortgage in accordance with Sections 11 and 12 of article V of this Mortgage (so which reference is hereby made), and also using said sinking fund moneys (if any) for the purpose of making such payment and for the purpose of paying the costs and expenses incident to such sale or foreclosure sale of the property."

"(b) In case of purchase by the Committee of such mortgage property, so dispose of the mortgage property in such manner as the Committee may deem advisable; or, if no such disposal is made by the Committee at the time the title to the mortgage property is transferred, it shall be sold by the Committee, or otherwise, to organize a new corporation to acquire said property and to hold the same in accordance with the provisions of this Mortgage."

"(c) To do or cause to be done whatever the Committee, in its discretion, may deem necessary or advisable to protect, preserve or enforce the rights and interests of the bondholders, in such manner and on such terms as the Committee shall think proper; to institute or cause to be instituted legal proceedings or otherwise, in respect to the mortgage property and to cause to be paid the costs and expenses thereof by the bondholders or otherwise; and, in general, to do or cause to be done such acts as the Committee, in its discretion, may deem proper in order to carry out fully and completely the purposes of this Mortgage."

The Bondholders' Protective Committee amended clause (b) of section (12) by adding to it the following words: "When capital stock may be issued as in and to the said mortgage property in the sale of the same by the Committee."

Section 13 of the Mortgage, which reads: "The Bondholders' Protective Committee had no power to amend the mortgage;" was amended by adding to it the following words: "The Bondholders' Protective Committee had no authority under the mortgage to amend the mortgage." (a) To organize a corporation with responsible stock. (b) To attempt to waive the personal liability of the corporate creditors for the responsible portion of the stock. (c) To organize a corporation and bondholder to accept responsible stock in lieu of its securities."

Defendants have argued that the organization of the Coeur D'Alene Pine Company with assessable stock was within the power of the Protective Committee "even without the amendment of the agreement," but we do not deem it necessary to pass upon this contention. We agree with the following, from the report of the master, "that under the terms of said original agreement, said Bondholders' Protective Committee had the power, whenever in its judgment it might be advisable, and from time to time, to amend the said agreement and that unless within a period of fifteen (15) days from the mailing of notice of any amendment, the registered holders of certificates of deposit representing more than 50% of the aggregate principal amount of the deposited bonds or coupons, filed with the depository, written notice of dissent, or if at any time within the period, registered holders of such certificates of deposit, representing 51% of the aggregate principal amount of the deposited bonds and coupons, filed with the depository written notice of their consent to such amendment, then in either case would such amendment be binding upon all the holders of certificates of deposit. The complainant who owns 10/650ths of the face value of all the bonds, is the only party to said agreement that is now objecting to the method pursued by the said Bondholders' Committee in carrying out the reorganization plan. Even though the amendment to said Section 12 materially changed the terms of the original agreement, said amendment was valid and binding on the various holders of the certificates of deposit, unless 50% of such holders objected thereto in accordance with the provisions of said agreement. The complainant being the only objector, and owning only 10/650ths of the face value of said bonds so deposited, is bound by the said agreement." The cases cited by complainant in support of its contention I may be readily distinguished under the facts. That the Protective Committee had the right, under clause (b) of section

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(12), to organize a new corporation cannot be questioned.

Complainant argues that it is a national bank and that defendants knew it to be such; that under the federal laws it could not accept assessable stock and that the Bondholders' Protective Committee had no power to require it to accept assessable stock in lieu of its securities. As an answer to this contention we quote from complainant's reply brief the following statement: "The plaintiff concedes that the powers of the committee are not controlled or limited by the charter powers of the complainant." In connection with the instant contention it is well to note what complainant asks us to do. To quote from the conclusion of complainant's brief: "We, therefore, submit that in so far as the decree of the trial court dismissing the Continental Illinois Bank and Trust Company, it should be affirmed, but in all other respects it should be reversed and that this court should enter a judgment against Joseph A. Auchter, Henry R. Chaney, James Pentress, Justin Jenner and L. F. Stevenson, the members of this Bondholders' Protective Committee, Baker, Pentress & Company and the Cesar D'Alene Pine Company, the Delaware corporation who took the property with notice of its trust and character, for the sum of \$9,255.32 with interest from and after November 1st, 1930 at 5% pursuant to the statute in such cases made and provided." Complainant reiterates the foregoing in its reply brief. The contention that the Protective Committee had no power to compel complainant, a federal national bank, to accept assessable stock in lieu of its securities, is not urged by complainant merely to save itself from a judgment, for in its brief it does not ask us to reverse and remand the decree with directions to award complainant a permanent injunction restraining defendants from ever enforcing any stock liability against complainant, nor does complainant ask us to

(12), as creating a new corporation named the "National Bank".

Complaint against the fact is a national bank and that

defendants knew it to be such; that under the Federal law it

could not accept deposits from and issue the "National Bank".

Protective Committee had no power to require it to accept deposits

except in case of the emergency, as an answer to this complaint

we quote from complainant's reply brief the following statement:

"The Plaintiff contends that the power of the committee was not

controlled or limited by the charter given to the committee."

In connection with the instant complaint it is said to note that

complaint says as to fact. To quote from the conclusion of com-

plainant's brief: "To, therefore, submit that in so far as the

issue of the National Bank is concerned the defendant is liable to

and Trust Company, it should be affirmed, but in all other respects

it should be affirmed and that this court should enter a judgment

against the National Bank, Henry J. Brown, John Brown, James

Lawson and J. V. Stevenson, the members of this National Bank."

Protective Committee, Robert, Lawrence J. Brown and the John

N. Lane Fine Company, the National corporation who took the

property with notice of the laws and character, for the sum of

\$5,000.00 with interest from and after November 1st, 1900 at 6%

payment to the extent in each case and provided, Com-

plaintiff petition for judgment in its favor, the National

Bank that the Protective Committee had no power to compel complainant

a Federal national bank, to accept deposits from and issue the

amount, is not urged by complainant merely to save itself from

judgment, for in the brief it says that it is to receive and

control the funds with the same to carry out the purpose of the

information contained in the National Bank and National Bank

information against complainant, and that complainant was to be

reverse and remand the cause with directions to the chancellor to enter a decree holding that the amendment to clause (b) of section (12) was beyond the power granted the Protective Committee under the Bondholders' Agreement and order the Committee to proceed in accordance with the agreement. Complainant would upset the plan that seems to be satisfactory to all of the stockholders save itself in order that it might obtain a personal judgment against the members of the Protective Committee, Baker, Pentress & Company, and the Occur D'Alene Pine Company. It now seeks to justify its attitude in this court by insisting that matters have progressed to a point where they cannot be returned to status quo and therefore nothing remains but to grant it the judgment it now seeks. This is a wide departure from the purposes and prayer of the bill. One of the objects of a protective committee is to guard against the evil that a small minority of the bondholders would have the power to resist arrangements which would be for the equal benefits of all unless superior advantages are conceded to them, at the expense of their fellows. The only case cited by complainant in support of its instant contention is First National Bank v. Converse, 200 U. S. 425. In that case it was held that notwithstanding its subscription, a national bank, taking stock in a corporation organized for purely speculative purposes, may plead its want of authority so to do as a defense to the claim of a receiver of such corporation for the double liability imposed by a state statute on the stockholders thereof. The court, in that decision, did not change or modify its former holding that

"As incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. National Bank v. Case, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. * * * First National Bank v. National

revenue and control the courts with reference to the jurisdiction
to order a license holding that the amendment to Article 10 of
section 112, as amended, the power granted the protective committee
under the Amendment, "any person and other the committee to proceed
in accordance with the amendment." (Amendment) which would give
that seems to be satisfactory to all of the Amendment and local
in order that it might obtain a personal judgment against the
members of the Protective Committee, Henry, Thomas & Company, and
the Court's decision is correct. It is not possible to justify the
attitude in this court by insisting that matters have proceeded
to a point where they cannot be returned to their original position
there nothing remains but to grant it the judgment is now made.
This is a wide departure from the purpose and scope of the bill.
One of the objects of a protective committee is to prevent against
the will that a small minority of the Amendment would have the
power to repeal amendments which would be for the equal benefit
of all unless superior advantages are conceded to them, as the
express of their rights. The only case cited by complainant in
support of its latest contention is First National Bank v. Board of
200 U. S. 482. In that case it was held that notwithstanding the
organization, a national bank, taking stock in a corporation
organized for purely speculative purposes, may place its name as
authority so as to be an officer in the name of a receiver of such
corporation for the double liability imposed by a state statute on
the stockholder's interest. The court, in that case, did not
change or modify its former holding that
"An incidental to the power to loan money on personal
security, a bank may in the name of its officers or directors
engage in other business as collateral, and by the
exercise of the power to engage in any business the power to
the officer and be subject to liability as other stockholders."
First National Bank v. Board of, 200 U. S. 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Exchange Bank, 92 U. S. 128."

The court, in the Converse case, bases its decision upon California Bank v. Kennedy, 167 U. S. 362, wherein Mr. Justice Harlan dissented, and in the Converse case that justice states that he concurs in the opinion of the majority solely because of the majority decision in the Kennedy case. In the Converse case Mr. Justice Brewer strongly dissents from the conclusion of the majority, and in his opinion (pp. 441-2) quotes the following from the opinion of Mr. Chief Justice Waite in First National Bank v. National Exchange Bank, 92 U. S. 122 (126, 127, 128):

"Whether a national bank, organized under the national banking act, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished.' And answering that question in the affirmative, it was said: 'Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances. * * * Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner v. Bank of United States, 3 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions.'"

Mr. Justice Brown concurred in the dissenting opinion of Mr. Justice Brewer. But whether or not the complainant in a suit wherein it was sought to hold it for a stock liability might interpose the

defense of ultra vires, under the facts of this case, is not controlling, as complainant is not being sued in the instant proceeding, and from its position in this court it is clear that it is not fearful of any such suit. In these days of reorganization it is not unusual to find a corporation or a fiduciary in the same position as complainant claims to be in as to the Cosur D'lene Pine Company stock, and it is conceded that the limitations upon the contracting power of certain corporations or fiduciaries cannot control the scope of reorganization plans that follow the bondholders' agreement. If complainant cannot hold the stock in the new company there are apt ways in which it may protect itself in that regard.

Moreover, section 13 of the Protective agreement reads as follows:

"No member of the Committee shall incur any liability hereunder for any action taken in good faith by him or by the Committee, nor any other liability hereunder, except for his own willful misconduct."

The master found that defendants acted in good faith and with an honest desire to do what was best for the interests of all concerned. We approve of that finding. Having so acted, in view of section 13 they have incurred no liability.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

37465

IN THE MATTER OF THE ESTATE OF
ROBERT M. BOWES, DECEASED.

ROBERT B. BOWES, Administrator
of the Estate of Robert M. Bowes,
Deceased,
(Petitioner) Appellee,

IRMA A. ULM,
(Respondent) Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

279 I.A. 618³

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

In the Probate court of Cook county Robert B. Bowes, administrator of the estate of Robert M. Bowes, deceased, filed a verified petition for a citation against Irma A. Ulm, respondent, which recites that respondent "has in her possession or control, or has concealed, converted or embezzled, goods, chattels, moneys, or effects, books of account, papers or evidence of debt, or title to land belonging to said Robert M. Bowes, deceased, and that she has knowledge or information of or concerning indebtedness or property, title or effects belonging to said deceased, which knowledge or information is necessary to the recovery of same by suit or otherwise, and that she refuses to give to your petitioner such knowledge or information." The petition prays that a citation be entered against said respondent pursuant to the statute. While we cannot find in the record a citation order against respondent, both parties assume that one was entered. In respondent's verified answer to the petition she states "that she has in her possession or under her control no goods, chattels, effects, moneys, books of account, papers, and evidences of debt belonging to said estate,

IN THE MATTER OF THE ESTATE OF
ROBERT A. BOWEN, deceased.

ROBERT A. BOWEN, Administrator
of the Estate of Robert A. Bowen,
deceased.

vs.
JAMES A. BOWEN, Defendant.

VERIFIED PETITION

FILED FOR RECORD

279 I.A. 978

THE JUDICIAL DEPARTMENT OF THE DISTRICT OF COLUMBIA

IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Administrators of the estate of Robert A. Bowen, deceased, filed
a verified petition for a citation against James A. Bowen, respondent,
which recited that respondent "has in his possession or control, or
has concealed, converted or embezzled, goods, chattels, money, or
effects, books or accounts, papers or evidence of debt, or title to
land belonging to said Robert A. Bowen, deceased, and that she has
knowledge or information of or concerning same, and that she has
title or effects belonging to said deceased, which knowledge or
information is necessary to the recovery of same by said or other-
wise, and that she refuses to give to your petitioners such knowledge
or information." The petition prayed that a citation be entered
against said respondent pursuant to the statute. While we cannot
find in the second a citation order against respondent, both peti-
tioners assume that one was entered. In respondent's verified answer
to the petition she states "that she has in her possession or
control no goods, chattels, effects, money, books or
accounts, papers, and evidence of debt belonging to said estate,

ner has she any knowledge or information of any such except as to the proceeds of a death benefit already collected by the administrator herein, as she is informed and believes; said death benefit being derived from the Steamfitters Protective Association, of Chicago, as the respondent is informed and believes, and is about the sum of Two Hundred Twenty Five Dollars;" that "said decedent and your respondent were, up to the time of his death, the owners in joint tenancy, and your respondent is now the owner, of the contents of a safety deposit box at the Woodlawn Safety Deposit Company, 1130 East 63rd Street, Chicago, Illinois, as follows, to-wit:" Here follows a statement of certain "Receipts from Bondholders Committees," bonds, certificates of stock, ^{\$630 cash} and two promissory notes of \$100 each. The respondent states that "as an evidence of the joint ownership of the decedent and your respondent in the foregoing items, and the individual ownership of your respondent since the death of the decedent, your respondent does hereby incorporate into this answer a written agreement entered into between the decedent and your respondent, covering the foregoing contents of the said safety deposit box in the Woodlawn Safety Deposit Company, as per exhibits numbered '1, '2,' and '3,' hereto attached, and made a part hereof," and ^{prays} "to be hence dismissed with her costs." We will hereafter refer to the exhibits mentioned in the answer. Upon a hearing the Probate court entered an order that the property held by the respondent was the property of the estate and ordered her to deliver the same to the administrator within thirty days from the entry of the order. Respondent prayed an appeal from the order. Thereafter the petition came on for hearing, de novo, in the Circuit court of Cook county, before

now has the knowledge of information of any such except as
to the proceeds of a death benefit already collected by the
administrator herein, as she is informed and believed; and
that benefit being derived from the Insurance Company
association, of Chicago, as the respondent is informed and be-
lieves, and is about the sum of Two Hundred Twenty Five dollars;
that said decedent and your respondent were, up to the time of
his death, the owners in joint tenancy, and your respondent in
now the owner, of the contents of a safety deposit box at the
Western Safety Deposit Company, 1100 East Third Street, Chicago,
Illinois, as follows: "Two dollars a statement of
outstanding receipts from Northwestern Telephone, Gas, and Electric
Company of Chicago, and two hundred dollars of said bank. The
respondent states that "as an evidence of the joint ownership
of the decedent and your respondent in the foregoing items, and
the collection of your respondent upon the death of
the decedent, your respondent has been interviewed with this
under a written agreement entered into between the decedent and
your respondent, covering the foregoing contents of the said
safety deposit box at the Western Safety Deposit Company, as per
exhibits numbered '1', '2', and '3', hereto attached, and made a
part hereto," and to be hence disclosed with her estate." We
will therefore refer to the exhibits mentioned in the answer.
Upon a hearing the Probate court entered an order that the
property held by the respondent was the property of the estate
and ordered her to collect the same to the administrator of the
estate from the safety of the estate. Respondent filed an
appeal from the order. Thereafter the Probate court on 10th
January, de novo, in the circuit court of Cook county, before

the court without a jury, and at the conclusion of the hearing an order was entered similar to the one that had been entered in the Probate court. Respondent now appeals from that order.

Respondent contends that the order of the Circuit court requiring her to deliver to the administrator the property in question is erroneous under the facts of the case. She contends that the rights of the parties are governed by a contract of the said Deposit Company with Robert M. Bowes, the decedent, and the respondent, dated December 10, 1926, which established a joint tenancy between the decedent and respondent in all property in the safety deposit box; that the articles which respondent is ordered to deliver to the administrator are the contents of this box and that she, as the surviving joint tenant, is entitled to the property under the contract. The property consisted of a number of receipts from bondholders' committees of various defaulted bonds in the face amount of \$3,100, certain bonds not in default of the face value of \$3,100, ten shares of the John R. Thompson Company stock, \$630 in cash, and two promissory notes of \$100, made by Harold Bowes, one of the heirs. At the time of the renting of the deposit box the following contracts or agreements (exhibits mentioned in respondent's answer) were entered into:

"Date Orig. 12-10-28
Safe 7970
Rate 5.00

Signature	R. M. Bowes
Address	1513 E. R. M. Bowes Marquette
Birthplace	Beaver Dam Wis
Occupation	Wrecking Engineer
Mother's Maiden Name	Martha Anderson (Mrs. Irma Ulm says S/B Andrews)
Signature Co-Renter	Irma A. Ulm
Address	5726 Midway Park Phone Aus. 0942
Birthplace	Beaver Dam, Wisconsin
Occupation	Bookkeeper Mother's Maiden Name Mary A. Brown
Reference	Mr. Bowes' daughter
Remarks	

WOODLAWN SAFETY DEPOSIT COMPANY

Chicago, Ill., Orig. 12-10-28

Received from Woodlawn Safety Deposit Co., of Chicago, Ill., receipt No. 7864 for rent of Safe Deposit Box No. 7970 which is leased by me subject to the terms of said receipt, and to all rules and regulations of said Company, as endorsed on said receipt, also acknowledged to have 2 keys of said Safe Deposit Box.

It is hereby agreed that the contents of this box may be withdrawn and removed therefrom in whole or in part, by all, or any one, or more of the Renters at any time.

The liability of the Bank by reason of the letting is limited to the exercise of reasonable diligence to prevent the opening of said safe by any one other than the lessee or his duly authorized representative, and it is expressly stipulated that no unauthorized access shall be inferable from proof of partial or total loss of the contents.

The renter shall not use the leased space for any purpose hazardous or illegal.

Witness:

H H B by I.M.K.

R. M. Bowes

* * *

Safe No. 7970 Date 12-10-28

Receipt 7864

It is hereby agreed that all articles and property at any time heretofore or hereafter placed or contained in said safe or box, now do and shall, so long as they are contained therein, continue to belong to the Renters jointly, with right of survivorship therein, and may be withdrawn and removed therefrom, in whole, or in part, by all, or any one or more of the Renters; and upon the death of any one or more of the Renters, the title to all articles and property then contained therein shall, upon every such death, vest and be in the survivor and survivors jointly, with right of survivorship therein, and such survivor or survivors, and any one or more of them, shall have the right to remove and withdraw from said safe or box all, or any part of the articles and property then, or at any time thereafter, contained therein.

Under no circumstances whatsoever shall the Woodlawn Safety Deposit Co. be held liable on account of the withdrawal or removal by all, or any one or more of the Renters, of all, or any articles and property from said safe or box, whether now, or at any time hereafter contained therein.

Signature R. M. Bowes (Seal)

Signature Irma A. Ulm (Seal)"

On November 29, 1932, after the death of the deceased, the Woodlawn Safety Deposit Company allowed respondent to withdraw from the box all the property therein, upon respondent's signing the following receipt:

"Chicago, Ill., 11/29/32

I hereby certify that all the property placed or stored in the Vault of The Woodlawn Safety Deposit Co., of Chicago, in pursuance of letting above mentioned, has been withdrawn therefrom and is in owner's full possession, all claims against and liability of said Company being debarred accordingly.

Irma A. Ulm"

This receipt appears upon the reverse side of respondent's exhibit 1. That the decedent and respondent signed the agreement and that the property in question was contained in the box at the time of the death of the deceased is not disputed. There is nothing in the record to indicate that there was any duress or fraud in the signing of the agreement. No claim is made that the decedent was not in his right mind and in control of his mental faculties, with full power to sign the contract or refuse to do so. Indeed, the only argument made by the administrator relates to the alleged construction given to the agreement by the deceased at the time he signed it. The agreement is a clear, unambiguous statement of the contract between the parties and in the absence of any evidence tending to show duress or fraud it is conclusive as to their relations to the property. The instant contention of the respondent is sustained by Illinois Tr. & Sav. Bank v. VanVlack, 310 Ill. 185, and Reder v. Reder, 312 Ill. 209. (See also Graham v. Barnes, 259 Mass. 534; In re Peterson's Estate, 239 Mich. 452.)

The administrator was allowed to introduce certain evidence, over the objection of respondent, the purpose of which was to show that respondent made oral statements that tended to show her interpretation of the agreement between the deceased and her and that are inconsistent with her present position in reference to the ownership of the property. The administrator contends that such evidence was admissible because it tended to prove the construction given the agreement by respondent and that such construction should have great weight in interpreting the contract. As the contract is plain and unambiguous, its construction as a matter of law and the relation of the parties is to be determined by its terms. It is only in cases where, from the words used in the contract, doubt arises as to the meaning of the contract that the acts of the

This receipt appears upon the return of respondent's
exhibit A. That the decedent and respondent signed the agree-
ment and that the property in question was contained in the box
at the time of the death of the decedent is not disputed. There
is nothing in the record to indicate that there was any dispute
as to the signing of the agreement. It is claimed that the
decedent was not in his right mind and in control of his
mental faculties, with full power to sign the contract on terms
so as to. Indeed, the only argument made by the administrator
relates to the alleged consideration given to the agreement by
the decedent at the time he signed it. The agreement is a clear,
unambiguous statement of the contract between the parties and in
the absence of any evidence tending to show error or fraud it
is conclusive as to their relations as to the property. The instant
contract of the respondent is sustained by Illinois v. A. B. V.
Ill. 121, 122, and 123, and Illinois v. B. C. D.,
(Ill. 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

parties may be taken into consideration to aid the court in ascertaining the meaning intended by showing the interpretation placed upon the contract by the parties themselves. (See Rosenbaum Bros. v. Devine, 271 Ill. 354, 357-8.) The rule that the courts will look to the acts of the parties indicating their interpretation of the contract, where its terms are ambiguous, will not be permitted to prevent the enforcement of the legal effect of a contract which is unambiguous in language and meaning. (Consolidated W. P. & P. Co. v. The Louisville Herald Co., 211 Ill. App. 569.) Many other cases to the same effect might be cited if it were necessary, but the rule stated is the settled law. In Illinois Tr. & Sav. Bank v. VanVlack, *supra* (p. 192), the court held that "evidence of the inconsistent words or acts of the parties is not competent." The contention of respondent that the trial court erred in admitting this evidence of the administrator, over her objection, is a meritorious one.

Holding, as we do, that the property in question belonged to respondent and not to the estate, the judgment of the Circuit court of Cook county is reversed and the cause is remanded to that court with directions to dismiss the petition for citation against respondent.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Sullivan, J., concur.

There is no doubt that the court in

examining the meaning of the word "person"

placed upon the contract by the parties themselves.

It is true that the court in

the case will look to the words of the parties

in the contract, and if the words are ambiguous,

it will not be permitted to construe the contract in favor of the party

who drafted it, but it is well known in law and equity

(see Smith v. Smith, 100 N. H. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Many other cases to the same effect might be cited in

it were necessary, but the rule stated in the cited law is

affirmed in Smith v. Smith, 100 N. H. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

The contract of partnership is not

void as to the partnership, even

if the partnership is a partnership.

Nothing, as we see, that the property in question belongs

to partnership and not to the estate, the judgment of the Circuit

court of Cook county is reversed and the cause is remanded to that

court with directions to enter the proper judgment against

the partnership.

IT IS SO ORDERED.

Witness my hand and seal of office, this 10th day of June, 1880.

37542

HARRY L. WELLS et al.,
Appellees,

v.

CENTRAL REPUBLIC TRUST
COMPANY, a corporation,
et al.,
Defendants.

CENTRAL REPUBLIC TRUST
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

279 I.A. 618⁴

MR. JUSTICE MCAMLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Harry L. Wells and Ella G. Wells, his wife, sued, in assumpsit, The Central Republic Trust Company, a corporation, formerly the Central Republic Bank & Trust Company, a corporation, successor by consolidation to the Central Trust Company of Illinois, a corporation, and the Chicago Trust Company, a corporation, Allen E. McDonnell and Virginia E. McDonnell, his wife, and Earl Geo. Gubbins and Mary L. Gubbins, his wife. The Central Republic Trust Company, Allen E. McDonnell and Earl Geo. Gubbins were served with process. Gubbins and McDonnell were defaulted and there was a separate finding and judgment entered against them for \$17,301.13, which judgment is not involved in this appeal. The case as to Central Republic Trust Company was tried by the court without a jury and there was a finding in favor of plaintiffs and their damages were assessed at the sum of \$12,740.74. Central Republic Trust Company has appealed from a judgment entered upon the finding. Plaintiffs have filed a cross-appeal praying that the judgment against Central Republic

WILLIAM H. WILSON & CO.,
ATTORNEYS AT LAW,
CHICAGO, ILL.

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WILLIAM H. WILSON & CO.,
ATTORNEYS AT LAW,
CHICAGO, ILL.

IN TESTIMONY WHEREOF THE PARTIES TO THE SAME,

Plaintiffs, Henry H. Wells and William H. Wells, his wife,
 and, as defendants, THE CENTRAL REPUBLIC TRUST COMPANY, a cor-
 poration, formerly the Central Republic Bank & Trust Company,
 a corporation, successor by consolidation to the Central Trust
 Company of Illinois, a corporation, and the Chicago Trust Company,
 a corporation, Allen H. McDonnell and Virginia E. McDonnell, his
 wife, and Earl Geo. Robbins and Mary E. Robbins, his wife. The
 Central Republic Trust Company, Allen H. McDonnell and Earl Geo.
 Robbins were named as parties. Robbins and McDonnell were
 defaulted and there was a separate finding and judgment entered
 against them for \$17,500.00, which judgment is not involved in
 this appeal. The case as to Central Republic Trust Company was
 tried by the court without a jury and there was a finding in
 favor of plaintiffs and their damages were assessed at the sum of
 \$12,740.00. Central Republic Trust Company has appealed from a
 judgment entered upon the finding. Plaintiffs have filed a
 cross-appeal praying that the judgment against Central Republic

Trust Company be affirmed and that this court enter a special finding in favor of plaintiffs and against that company in the "further sum of \$4,660.37, or a total judgment of \$17,301.13." No point is made as to the pleadings.

The facts, save in one or two instances, are not disputed. On May 10, 1924, plaintiffs, as purchasers, entered into a written contract with defendants Allen E. McDonnell and Virginia B. McDonnell, his wife, and Earl Geo. Gubbins and Mary L. Gubbins, his wife, as vendors, for the purchase and sale of certain lots in Chicago. This contract provides that the purchasers shall pay the vendors \$11,000 for the property, \$2,500 as earnest money, and the balance, \$8,500, payable \$100 or more every thirty days thereafter, with interest at six per cent on the entire remaining unpaid balance, "until principal indebtedness is reduced to the amount of First Mortgage, when the purchaser shall receive Warranty Deed." On August 20, 1924, the Gubbinses and McDonnells conveyed by deed to the Chicago Trust Company, as trustee, certain property which included that involved in the contract. The deed stated that the property was being conveyed to the Chicago Trust Company, as trustee, under provisions of a trust agreement known as Trust No. 1234. The deed also provided "that in no case shall any party dealing with the said Trustee in relation to the premises, be obliged to see to the application of any purchase money, rent or money borrowed or advanced, on said premises, or be obliged to see that the terms of this trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of said Trustee, or be privileged or obliged to inquire into any of the terms of said Trust Agreement." Trust agreement No. 1234 had practically the same clause therein. On or about October 23, 1924, the Gubbinses and McDonnells assigned the contract with plaintiffs, and eleven other like contracts, to the Chicago Trust Company, as trustee, under the

said trust agreement and the said deed. Prior to the assignment plaintiffs had paid to the vendors, on account of the contract, \$3,967. After acquiring title, Chicago Trust Company advised Wells that "from that time on my payments should be made to the Chicago Trust Company, that they had title to the property and they held my contract," and as a result of this statement and instruction plaintiffs paid directly to it \$805. Later, Wells was instructed by Chicago Trust Company to make all future payments to Gubbins & McDonnell, a partnership, and at the same time he was told that the said partnership would remit the payments to the bank, and that plaintiffs' contract would be credited with all payments so made. Thereafter plaintiffs made all payments as so directed. It is admitted that the bank actually received from said partnership \$6,901.19 which was paid by plaintiffs to the partnership under the instructions from the bank. Plaintiffs also paid \$1,882.26 for general taxes and special assessments on the lots, which payments they were obligated to make under the terms of their contract. The contract between plaintiffs and the McDonnells and Gubbins provides that the sale was made subject to a blanket first mortgage on which the approximate share of the lots purchased by plaintiffs was \$6,100, and further provides that when plaintiffs had paid \$4,900 on the contract a deed to the property would be given them. Wells testified that after they (plaintiffs) had paid \$4,900 on the contract he had a telephone conversation, in August, 1926, with Mr. Kleder, the assistant secretary of the Chicago Trust Company, in which he told Kleder that they had paid on the contract the amount necessary to obtain a deed, and that Kleder said "I could get a deed subject to the remaining balance under the first mortgage on my contract, or I could continue to make my payments as I had been in the past, and when the balance of \$6,100 was paid,

with terms agreement and the said debt. With to the agreement
plaintiff had paid to the vendors, on account of the contract,
\$3,000. After receiving title, Chicago Trust Company advised
wells that "from that time on my payments should be made to the
Chicago Trust Company, that they had title to the property and
they held my contract," and as a result of this statement and
instruction plaintiff paid directly to it \$200, later, all
was instructed by Chicago Trust Company to make all future payments
to Subline & McDonnell, a partnership, and at the same time he was
told that the said partnership would make the payments to the bank,
and that plaintiff's contract would be satisfied with all payments
so made. Thereafter plaintiff made all payments as so directed.
It is admitted that the bank actually received from said partnership
only \$5,001.19 which was paid by plaintiff to the partnership
under the instructions from the bank. Plaintiff also paid
\$1,882.25 for general taxes and special assessments on the lots,
which payments they were obligated to make under the terms of their
contract. The contract between plaintiff and the McDonnell and
Subline provides that the said was made subject to a blanket first
mortgage on which the approximate share of the lots purchased by
plaintiff was \$5,100, and further provides that when plaintiff
had paid \$4,000 on the contract a deed to the property would be
given them. Wells testified that after they (plaintiff) had paid
\$4,000 on the contract he had a telephone conversation, in August,
1925, with Mr. Klader, the assistant secretary of the Chicago Trust
Company, in which he told Klader that they had paid on the contract
the amount necessary to obtain a deed, and that Klader said "I
would get a deed subject to the remaining balance under the first
mortgage on my contract, or I could continue to make my payments as
I had been in the past, and when the balance of \$5,100 was paid,

the bank would deliver me title free and clear of everything," and that, acting upon this statement of Kleder, he then sent his check for \$261 to apply on the contract. Kleder denied having this conversation with Wells. Plaintiffs, acting upon the telephone conversation, thereafter made payments that aggregated \$4,100. After said sum had been paid, Wells was informed that the Gubbins & McDonnell partnership was having difficulties with the defendant bank, and he discontinued payments until he could ascertain what was the proper thing to do under the circumstances. He then learned that the blanket first mortgage on the premises had matured on May 7, 1929, and had not been paid nor extended, and he thereupon took the matter up with Central Republic Trust Company and was told by it to see Gubbins & McDonnell. Foreclosure proceedings upon the "blanket mortgage" covering the entire property were commenced May 28, 1930, and a decree in complainants' favor was entered September 29, 1931. Plaintiffs' attorney informed the bank several times that plaintiffs were willing to go ahead and complete the transaction. Plaintiffs made several written demands on the bank for a fulfillment of its agreement but these demands were ignored by it. They, through a representative, then tendered to the defendant bank \$2,340 in gold, and demanded that the property be conveyed to them, free and clear of the mortgage, but this tender was refused. Plaintiffs thereupon elected to rescind the contract and this action is brought to recover the moneys paid by them upon the contract, together with interest thereon at the legal rate from date of payment and the amount paid for taxes and special assessments. On the trial of this cause it was admitted that if the Chicago Trust Company is liable, the Central Republic Trust Company, successor-trustee thereto, is also liable.

Many of the points made and a great part of the argument in defendant's brief are predicated upon the assumption that plaintiffs' cause of action is based upon a quasi contractual relationship, or

the bank would deliver on this time and also of everything," and
that, acting upon this statement of Kishor, he then went to his bank
for cash to apply on the contract. Kishor denied having this con-
tracting with him. Plaintiff, acting upon the statement con-
tradictory, immediately made payment and was repaid \$2,100. After
this was paid, Wells was informed that the building is personally
partnership was having difficulties with the defendant bank, and he
thereupon proposed that he would contribute what was the value
thing to do under the circumstances. He then learned that the plaintiff
first mortgage on the premises had matured on May 1, 1927, and had not
been paid not attached, and he thereupon took the matter up with
Central Republic Trust Company and was told by it to see Kishor &
Kishor. Kishor's presence upon the "closed mortgage" matu-
ring the entire mortgage was commenced May 22, 1926, and a decree in
plaintiff's favor was entered September 22, 1927. Plaintiff's
attorney informed the bank several times that plaintiff was willing
to go ahead and complete the transaction. Plaintiff made several
written demands on the bank for a fulfillment of the agreement but
these demands were ignored by it. Then, through a representative,
then rendered to the defendant bank \$2,100 in cash, and demanded that
the property be conveyed to them, free and clear of the mortgage, and
this demand was refused. Plaintiff's attorney elected to sue on the
contract and this action is brought to recover the money paid by him
upon the contract, together with interest thereon at the legal rate
from date of payment and the amount paid for taxes and special assess-
ment. On the trial of this cause it was admitted that in the Chicago
Trust Company is liable, the Central Republic Trust Company, however,
trustee thereof, is also liable.

Many of the points made and a great part of the argument in
defendant's brief are repeated upon the assumption that Plaintiff's
cause of action is based upon a usual contractual relationship, as

implied contract, whereas plaintiffs claim that they can recover upon an implied contract or an express contract with defendant; but in the view that we have taken of this appeal, we do not deem it necessary to consider the question as to whether or not plaintiffs have a cause of action based upon an implied contract, and therefore many of the points made by defendant need not be considered.

It is conceded that when plaintiffs had paid \$4,900 upon the contract they were entitled to a deed. While Kleder denied having the telephone conversation with Wells in August, 1926, it appears from the record that the trial court, who saw and heard the witnesses, believed that Wells told the truth as to the conversation. We have carefully considered the testimony of both witnesses and also certain facts and circumstances that tend to throw light upon the controverted question, and we are satisfied that the trial court was fully justified in believing the testimony of Wells. Defendant makes the somewhat strange argument that Wells, a business man, could not have relied upon Kleder's statements to him. It is a matter of common knowledge that practically all persons dealing with large banks relied upon statements of officials of such institutions in 1926. It follows, in our judgment, from the testimony of Wells, especially when considered with other facts and circumstances in evidence, that the Chicago Trust Company expressly assumed to deliver title to the lots, free and clear of incumbrances, provided that plaintiffs paid the balance, \$6,100, due upon the contract. Chicago Trust Company, as trustee, took title to the property by deed. It took an assignment of the contract between plaintiffs and the Gubbinses and McDonnells. It exercised complete authority, in so far as plaintiffs were concerned, over the contract and the real property involved therein. It exercised a like authority as to other purchasers who had contracts for lots in the subdivision that was conveyed to

implied contract, whereas plaintiff's claim that they can recover upon an implied contract on an express contract with defendant, but in the view that we have taken of this appeal, we do not deem it necessary to consider the question as to whether or not plaintiff have a cause of action based upon an implied contract, and therefore many of the points made by defendant need not be considered.

It is conceded that when plaintiff had paid \$2,500 upon the contract they were entitled to a deed. While it is true that having the telephone conversation with Wells in August, 1926, is apparent from the record that the trial court, who was and heard the witness, believed that Wells told the truth as to the conversation, we have carefully considered the testimony of both witnesses and also certain facts and circumstances that tend to throw light upon the controverted question, and we are satisfied that the trial court was fully justified in believing the testimony of Wells. Defendant makes the somewhat strange argument that Wells, a business man, could not have told what King's representative he did. It is a matter of common knowledge that practically all persons dealing with large banks relied upon statements of officials of such institutions in 1926. It follows, in our judgment, from the testimony of Wells, especially when compared with other facts and circumstances in evidence, that the trial court's finding regarding the balance due is correct. The balance of \$2,100, and upon the contract. Chicago Trust Company, as trustee, took title to the property by deed. It took an assignment of the contract between plaintiff and the defendant and defendant. It executed complete authority in so far as plaintiff were concerned, over the contract and the real property involved therein. It executed a like authority as to other parties who had interests in the real estate that was conveyed to

Chicago Trust Company, Trustee, by the McDonnells and Gubbinses. From the time it notified plaintiff Wells to make all future payments to it, under the contract, it received all moneys that were paid under the contract. It made agreements with other purchasers similar to the one that it made with plaintiffs. Defendant, in its reply brief, practically concedes that it might be unjust for the bank to retain the moneys paid it after the telephone conversation if Wells' version of the same is to be believed, and in the oral argument before us counsel for defendant conceded that if said version is to be believed, plaintiffs would be entitled to recover the moneys paid after the telephone conversation, plus interest after the date of the demand.

Defendant contends, in its brief, that the telephone conversation, "if it did occur, could not bind the Trust Company on a contract, because of the statute of frauds." In support of this contention defendant cites cases stating the well known rule of law that the mere payment of money under an oral promise to convey land does not take the promise out of the Statute of Frauds. All of the cases cited relate to bills for specific performance and have no application to the facts of the instant case.

Defendant contends that plaintiffs cannot recover because they did not keep their tender good. It is a sufficient answer to this contention to say that when plaintiffs tendered the amount due under the contract to defendant, in gold, the bank refused the tender, disclaimed liability, stated that it could not deliver title, and referred plaintiffs to Gubbins & McDonnell. Thereupon plaintiffs, as they had a right to do, rescinded the contract. The cases cited by defendant do not apply to the facts of this case.

Defendant contends that "under the contract, Wells probably had a right to rescind when he did not receive his

deed subject to a mortgage in 1926. Not having elected to take that step and having continued his payments, he clearly lost any right of rescission based upon that breach." It is sufficient to say, in response to this contention, that plaintiffs continued payments on the contract because of Kleder's statement to Wells and defendant continued to receive the same, and it is therefore in no position to raise the instant contention.

Defendant next contends that "the plaintiffs next got a right to rescind, as against the vendors, after they made the tender October 27, 1932 (assuming it was a good tender). They did not elect to rescind by bringing suit until February 15, 1933. This is not prompt and immediate action." It is a sufficient answer to this contention to say that the evidence shows that after the refusal of the tender negotiations were carried on for a settlement of plaintiffs' claim and that participating in these negotiations upon the part of the bank were Mr. Leonard, a vice president of the bank, Mr. Watts, an attorney for it, and Mr. Beckett, connected with it. The argument that plaintiffs did not want the lots and were concerned only in obtaining from the bank the moneys they had paid is not warranted by the facts and circumstances of the case. But for Kleder's statement to Wells, plaintiffs would have had title to the lots in August, 1926.

Defendant contends: "If we have failed to persuade the court down to this point, there is still one item making up the judgment which is unjust. That is the item of interest, amounting to \$3,455.29. The contract provided that the purchasers should be entitled to possession of the premises sold. If their tender made October 27, 1932 was good, they were thus entitled to the possession down to expiration of the period of redemption, October 29, 1932. Interest for the period down to that date amounts to \$2,852.02;

dead subject to a mortgage in 1936. Not having elected to take that step and having continued his payments, he clearly lost any right of redemption based upon that mortgage. It is well settled, so says, in response to this contention, that plaintiff's continued payments on the contract because of Kiebas's statement to Wells and its failure to continue to receive the same, and it is therefore in no position to raise the instant contention.

Defendant next contends that "the plaintiff's deed was a right to rescind, as against the vendors, after they made the latter October 27, 1932 (assuming it was a good tender). They did not elect to rescind by holding suit until February 12, 1933. This is not prompt and immediate action." It is a sufficient answer to this contention to say that the evidence shows that after the return of the tender negotiations were carried on for a settlement of plaintiff's claim and that participating in these negotiations upon the part of the bank were Mr. Leonard, a vice president of the bank, Mr. Walter, an assistant vice president, and Mr. Kiebas, treasurer. The evidence shows that plaintiff did not want the loan and was concerned only in obtaining from the bank the money they had paid is not warranted by the facts and circumstances of the case. But for Kiebas's statement to Wells, plaintiff would have had title to the loan in August, 1933.

Defendant contends: "If we have failed to purchase the bank from its point, there is still one item making up the judgment which is unjust. That is the item of interest, amounting to \$2,488.25. The contract provided that the mortgage should be nullified on possession of the business note. It never issued until October 27, 1932 was good. They were then entitled to the possession from the expiration of the period of redemption, October 27, 1932. Interest for the period from to that date amounts to \$2,488.25."

interest from that date to date of judgment amounts to but \$603.29. If plaintiffs are entitled to recover the various items included in the judgment below, interest however should have been but \$603.29. To give plaintiffs interest for the deprivation of the use of their money for the entire period of time is, we respectfully submit, to allow them something they have already received, and does not square with the equitable character of the plaintiffs' action." If we correctly understand this contention there is no merit in it. The contract between plaintiffs and the McDonnells and the Gubbinses provides:

"That no right, title or interest, legal or equitable in said premises shall vest in said party of the second part until the deed conveying the premises, as herein agreed upon, shall have been delivered, or in case of failure on the part of the party of the first part to deliver said deed in accordance with the terms hereof agreed upon, shall have been paid or tendered in full to the party of the first part."

Here, plaintiffs never had title to the property and never had possession of it, although they had the right to a deed in August, 1926. They did not then obtain title because of the statement of Kloder to Wells. The cases cited in support of the instant contention have no bearing upon the facts of the instant case.

We now come to a consideration of plaintiffs' cross-appeal, wherein they contend that they are entitled to a greater amount than the trial court allowed them, viz., \$3,067 paid to the vendors, under the contract, prior to the time that the deed and assignment were given to Chicago Trust Company by the vendors, together with statutory interest from date of payments to date of judgment, amounting to \$1,493.39. As to this contention of plaintiffs, defendant states: "We must tell the court, frankly, that so far as we can find, this is a case of first impression. * * * The precise facts of this case, however, do not seem to have been involved in any reported case." Under the facts of this case, as we find them, the Chicago

Trust Company, assignee, assumed the assignors' liability under the contract and thus created contract relations between it and plaintiffs, or, to state it in another way, it stood in the shoes of the vendors in respect to the contract. The contention raised by plaintiffs in their cross-appeal must therefore be sustained. We find, therefore, that the trial court should have assessed plaintiffs' damages at \$17,301.13, instead of \$12,740.74.

The judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of plaintiffs and against defendant in the sum of \$17,301.13.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF PLAINTIFFS AND AGAINST
DEFENDANT IN THE SUM OF \$17,301.13.

Gridley, D. J., and Sullivan, J., concur.

37414

MANDEL H. HARRIS,
Appellant,

v.

MARK JAMPOLIS, SIDNEY
JAMPOLIS and THERESA JAMPOLIS,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 619¹

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sues Mark Jampolis, Sidney Jampolis and Theresa Jampolis to recover the sum of \$500 on a bond signed by them, together with interest at the rate of six per cent per annum. The bond was one of a series of 610 bonds that were secured by a trust deed upon certain property. Mark Jampolis was the only defendant served. The case was tried by the court. No evidence was offered by defendant. The trial court found that plaintiff take nothing by his suit and that defendant Mark Jampolis recover from plaintiff his costs. Plaintiff has appealed. Defendant has not filed a brief in this court.

The third amended affidavit of merits sets up a number of defenses to the claim, only one of which need be noticed, viz., that plaintiff is precluded from suing upon the bond in an action at law by reason of article III, section 1, of the trust deed securing the bond, which reads as follows:

"Article III, Section 1. It is hereby declared and agreed as a condition upon which each legal holder or holders of all or any of said bonds receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceedings in law or in equity, of whatever character or kind for the foreclosure of this deed of trust or for the execution of the trust herein provided, or for the appointment of a receiver, or for any other remedy under this instrument, or for enforcing the lien hereby created, without having first made application to the Trustee, as hereinbefore provided, and until the Trustee shall have wrongfully or un-

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reasonably failed to institute proceedings for the foreclosure of this deed of trust, or for the execution of the trusts hereunder, or for the appointment of a receiver, or for any other remedy under this deed of trust, or for enforcing the lien hereby created, as the case may be for sixty (60) days after the giving of notice in writing to the Trustee so to do. All rights of action under this deed of trust or under any bonds or coupons secured thereby, may be enforced by the Trustee in its discretion without the possession of any of the bonds or coupons or the production thereof on any trial or proceedings hereunder."

The court found for defendant upon the theory that this section in the deed of trust barred plaintiff from suing at law on the bond, and the only question presented by this appeal is whether or not the court's ruling was justified under the facts and the law. The only language in the bond that has any bearing upon the instant question is the following: "*** for a full description of which deed of trust and the terms and conditions under which this bond is issued, secured and held, and the limitations on the rights of bondholders, reference is made to said deed of trust."

The instant question is controlled by Quinlan v. Vengler & Maggell, 358 Ill. 302, very recently decided by our Supreme court. (See also Cummings v. Schinigen-Lake Bldg. Corp., 277 Ill. App. 470; Mayer v. Ludlow Typograph Co., App. Ct. Den. No. 37537, opinion filed this date.)

Even if we assumed that said section 1 of the trust deed precluded the plaintiff from suing at law on his bond, nevertheless, it is clear that the language in the bond upon which defendant must rely did not fairly include, by reference, the no-action clause of the trust deed, and, therefore, under the decision in the Quinlan case, plaintiff would have a right to bring a personal action to recover on the bond. But even the language in the trust deed upon which defendant relied does not preclude plaintiff from maintaining an action at law upon the bond.

It was stipulated in the trial court that if plaintiff had the right to maintain his action there was due him \$546.05.

plus interest at seven per cent per annum from April 6, 1934.
There is therefore due plaintiff the sum of \$579.48.

The judgment of the Municipal court of Chicago is
reversed and judgment will be entered here in favor of plaintiff
and against defendant Mark Jampolis in the sum of \$579.48.

JUDGMENT REVERSED AND JUDGMENT HEREIN IN
FAVOR OF PLAINTIFF AND AGAINST DEFENDANT
MARK JAMPOLIS IN THE SUM OF \$579.48.

Oridley, F. J., and Sullivan, J., concur.

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

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THE UNIVERSITY OF CHICAGO

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37627

JEAN S. GRARY, as Assignee, etc.,
Appellee,

v.

THE NATIONAL TRSA COMPANY, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 619²

MR. JUSTICE SCAGLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of Foreman-State Trust & Savings Bank, as receiver, and Joseph B. Ford, as successor receiver, of certain premises, sues defendant for rent of a store room in the premises. The trial court found the issues against defendant and entered judgment against it for \$1,800, the full amount claimed by plaintiff.

Plaintiff's statement of claim alleges that on December 26, 1930, Foreman-State Trust & Savings Bank was appointed receiver of the premises known as 3301 West Madison street, Chicago, and as such receiver managed and controlled the premises until July 16, 1931, when it resigned as receiver and Joseph B. Ford was appointed successor receiver; that on March 7, 1928, defendant entered into a lease for a store room in the premises for a term commencing May 1, 1928, and ending April 30, 1931, at a rental of \$125 per month from May 1, 1928, to April 30, 1929; \$135 from May 1, 1929, to April 30, 1930, and \$150 from May 1, 1930, to April 30, 1931; that upon the appointment of the bank as receiver defendant attended to said receiver and paid to it the rental provided in the lease for January, 1931, to April, 1931, both inclusive; that defendant failed and refused to vacate the premises on April 30, 1931, and by reason thereof it became a hold-over tenant for a one-year period from May 1, 1931; that the bank, as receiver, elected to consider defendant as a hold-over tenant for a period of one year and that there is due and owing from defendant the sum of \$1,800; that on January 27, 1935, the bank,

as receiver, by an instrument in writing, assigned its claim against defendant to plaintiff, and on January 14, 1933, Joseph M. Ford, as successor receiver, by an instrument in writing, assigned his claim against defendant to plaintiff; that both assignments were in pursuance of an order entered in the Superior court of Cook county, in case 529283; that plaintiff is the actual bona fide owner of the claim against defendant. Defendant's affidavit of merits denies that defendant became or was a hold-over tenant of the receiver of said premises, and denies that the receiver elected or had the right to elect to consider or hold defendant as a hold-over tenant for any period of time; denies that defendant is indebted to plaintiff in any sum whatsoever; denies that said bank, as receiver, had the right or power to execute the assignment to plaintiff, and farther denies that Joseph M. Ford, receiver, had the right, power or authority to execute the assignment to plaintiff; denies that the Superior court had jurisdiction to enter the alleged order in case 529283, and denies that plaintiff is the actual bona fide owner of the claim.

Defendant contends that "the order of the Superior Court of Cook County, entered January 11, 1933, directing the receiver and successor receiver to assign their claims to the plaintiff was wholly ineffectual, because, (A) The Superior Court had lost jurisdiction * * * over the case nearly two terms before such order was entered. (B) Both Foreman-State Trust & Savings Bank and Joseph M. Ford, the former receivers of the property, had filed their final accounts, and the same had been approved, and they had been discharged by the Court at the time the order of January 11, 1933, was entered and at the time the assignments to the plaintiff were executed. Neither had the capacity to execute such assignments as receiver." As to defendant's very technical argument in support of this contention we may say that while it is true that the court had lost its power to

as receiver, by an instrument in writing, assigned the claim against defendant to plaintiff, and on January 11, 1935, Joseph B. Ford, as successor receiver, by an instrument in writing, assigned the claim against defendant to plaintiff; that both assignments were in compliance of an order entered in the Superior Court of Cook County, in case No. 259221; that plaintiff is the actual bona fide owner of the claim against defendant, defendant's attorney at law being that defendant became or was a hold-over tenant of the receiver at said premises, and failed both the receiver elected or had the right to elect to constitute or hold defendant as a hold-over tenant for any period of time; that since that defendant is indebted to plaintiff in any sum whatsoever; that since that said bank, as receiver, had the right or power to execute the assignment to plaintiff, and further since that Joseph B. Ford, receiver, had the right, power or authority to execute the assignment to plaintiff; that since that the Superior Court had jurisdiction to enter the aforesaid order in case No. 259221, and since that plaintiff is the actual bona fide owner of the claim.

Defendant contends that "the order of the Superior Court of Cook County, entered January 11, 1935, assigning the receiver and successor receiver to manage their claim to the plaintiff was wholly incorrect, because, (A) The Superior Court had no jurisdiction * * * over the case merely two years before such order was entered. (B) Both Foreman-State Trust & Savings Bank and Joseph B. Ford, the former receiver of the property, had filed their final accounts, and the same had been approved, and they had been discharged by the Court at the time the order of January 11, 1935, was entered and at the time the assignments to the plaintiff were executed. Neither had the necessity to execute such assignments as receiver," as it is defendant's very technical argument in support of this contention we say only that while it is true that the court had lost its power to

amend any of the matters finally adjudicated during the course of the litigation, plaintiff, in her petition, did not attempt to have any matter that had been finally adjudicated changed or corrected. In her petition she merely called the attention of the court to her right to certain assets of the receivership estate which had not been disposed of by any order of the court. In passing upon her petition the court merely determined that she, not the owner of the equity of redemption, was entitled to the claim for rent against defendant, and ordered the receiver and the successor receiver to assign to her all their right, title and interest in the claim for rents against defendant. The owner of the equity of redemption, if he had seen fit, might have appealed from that order, but he did not. The owner of the equity of redemption is bound by the order, and we are unable to see why defendant should complain of it. Nor are we impressed with the argument that defendant might be called upon to respond twice to the same claim.

Defendant further contends: "The Foreman-State Trust & Savings Bank, acting as receiver of the property in question, had not the right or power to elect to hold the defendant as a tenant for another year." The argument is, that the record fails to show that the receiver executed the lease by order or consent of court, and therefore the lease is not binding and the receiver would have no power to elect to hold defendant as a tenant holding over for another year. It is ^a sufficient answer to this contention to say that defendant took possession of the premises under the lease in question, attorned to the receiver, and is in no position to complain that the record does not show that the receiver executed the lease by reason of a court order. The owner of the premises, of course, might complain if the receiver had leased the premises without a court order or contrary to a court order.

... of the estate finally adjudicated during the course of the litigation, plaintiff, in her petition, did not attempt to have any matter which had been finally adjudicated brought on for review. In her petition she merely called the attention of the court to her right to certain assets of the testator's estate which had not been disposed of by any order of the court. In passing upon her petition the court merely determined that she, and the owner of the equity of redemption, was entitled to the claim for rent against defendant, and ordered the receiver and the executor to assign to assignee to her all their right, title and interest in the claim for rent against defendant. The owner of the equity of redemption, in her petition, did not seek to have the claim for rent assigned to her. The owner of the equity of redemption, and we are unable to see why defendant should complain of the order, and we are unable to see why defendant should assign to the court any matter which the court has already decided.

Defendant further contends: "The Receiver-Exor Trust & Savings Bank, acting as receiver of the property in question, has not the right or power to hold the defendant as a tenant for another year." The argument is, that the second lease is void, that the receiver executed the lease by order of court, and therefore the lease is not binding and the receiver would have no power to lease to hold defendant as a tenant holding over for another year. It is submitted that the contention is very weak because each generation of the proceeds under the lease is paid, allotted to the receiver, and it is in no position to deny that the second lease was not void when the receiver executed the lease by reason of a court order. The owner of the premises, of course, would complain if the receiver had leased the premises without a court order or contrary to a court order.

Defendant contends that "the trial Court erroneously excluded competent and material evidence offered by defendant and refused to receive competent, relevant and material evidence offered by the defendant tending to show an election on the part of the receiver to hold the defendant for double rent during the period of occupancy after the termination of the lease." The law is settled that where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, nor of paying the same rent. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Weber v. Powers, 213 Ill. 370; Peck v. Christman, 94 Ill. App. 435.)

"Having once elected to hold him to the one liability, he is not permitted to shift his position and elect to hold him to the other. And slight acts will be construed as constituting such an election." (Peck v. Christman, *supra*, p. 437; see also Clinton Wire Cloth Co. v. Gardner, *supra*, p. 159.)

In the instant case the defendant offered to prove that on or about May 20, 1931, a Mr. Knepper, employed by William T. Geary, agent for the receiver, brought into the office of defendant company a letter from Geary, signed by him as agent for the receiver, in which a demand was made for double rent for the premises for the month of May, 1931; that the letter was handed by Knepper to Albert A. Yort, an attorney for defendant company, and that Yort, after reading the letter, stated to Knepper that defendant had been a good tenant for many years, that the property into which it was about to move was still occupied by a tenant whose lease had expired and that therefore defendant had been unable to vacate, and that in view of the fact that defendant had been such a good tenant and would be out of the premises by the end of May, 1931, defendant should not be

held for double rent for the month of May; that Vert handed back the letter to Knepper, at the same time saying to him: "Take this letter back to Mr. Geary and tell him what I have told you and see if he won't withdraw this demand for double rent," and that thereupon Knepper took the letter away. The court, upon objection by plaintiff, refused to permit defendant to show any of the alleged facts set up in the offer. Plaintiff does not contend that defendant might not have shown, by proper evidence, an election by the landlord to hold defendant for double rent rather than as a tenant for another year, but she attempts to sustain the ruling of the court in excluding the offered evidence upon technical grounds. Plaintiff first contends that the proper foundation for admitting secondary evidence had not been laid, as no notice had been served upon plaintiff to produce a letter, the contents of which defendant sought to prove. There is no merit in this contention, as counsel for plaintiff stated in open court that plaintiff denied that there ever was such a letter written by Geary and that if notice had been served upon plaintiff to produce it the answer to the notice would have been that no such letter had ever been written and that, therefore, it could not be produced by plaintiff. In an effort to prove its claim as to the alleged election by the landlord, defendant called as a witness, Knepper, who testified that when he made the call upon defendant he had no letter from Geary and did not present to Vert any such letter. Plaintiff argues that defendant, having called Knepper, is bound by his testimony. There is no merit in this contention. The law is well settled in this state that while a party to a suit cannot impeach the witness voluntarily called by him, he may introduce other evidence disproving the statements of such witness. As stated in Chance v. Kinsella, 310 Ill. 515, 523:

"The appellee called the appellant as her own witness. She was not for that reason bound by his testimony but might show the truth by any competent evidence, even in direct contradiction

half for double rent for the month of May; that Mrs. Hannah had
the letter to Gregory, at the same time saying to him: "Take this
letter back to Mr. Gregory and tell him what I have told you and see
if he won't allow this double rent," and that when
upon Gregory took the letter back. The court, upon objection by
plaintiff, refused to permit testimony to show any of the alleged
facts set up in the offer. Plaintiff does not contend that defendant
might not have shown, by proper evidence, an election by the landlord
to hold defendant for double rent rather than as a tenant for another
year, but she attempts to sustain the ruling of the court in excluding
the witness by showing that defendant's testimony is inadmissible. Plaintiff
shows that the proper testimony for a witness is not plaintiff's testimony
and that plaintiff, as an agent and not merely as plaintiff, is not
admitted to testify, the testimony of which defendant seeks to give. There is
no merit in this contention, as defendant's testimony is not
admitted to testify that Gregory told her that he had written
to Gregory and that it would not be long before Gregory would be
in the house in the winter and that she would be with him and
over been written and that, therefore, it could not be produced by
plaintiff. In an effort to prove the claim as to the alleged election
by the landlord, defendant called as a witness, Gregory, who testi-
fied that when he made the call upon defendant he had no letter from
Gregory and did not pretend to take any letter from plaintiff. Plaintiff
that defendant, having called Gregory, is bound by his testimony.
There is no merit in this contention. The law is well settled in this
state that while a party to a suit cannot impeach the witness whom
he has called by him, he may introduce other evidence disproving the
statements of such witness. As stated in Chance v. Marshall, 210

ILL. 512, 513.

"The appellee claims the appellant as her own witness,
and yet not the fact proven by his testimony but might show
the truth of the defendant's statement, even in direct contradiction

of what the appellant testified, but she could not call in question the appellant's credibility." (See Kovell v. North Roseland Motor Sales, 275 Ill. App. 566, 571-2, where the cases bearing upon the question are cited.)

Plaintiff contends that the authority of Geary to make the alleged election is not shown by the record. The objection to the offered evidence was a general one. Moreover, plaintiff, in proving her case, offered the following:

"WILLIAM T. GEARY.
Real Estate
Room 2316 - 128 N. Wells Street
Telephone Randolph 5774.

Chicago, May 29th, 1931

National Tea Co.
1000 Crosby St.,
Chicago, Illinois.

Gentlemen:

I herewith return check for \$150.00 forwarded to me with your letter of this date.

We have elected to hold you for another year at the same rental, \$150.00 per month, for store 3301 W. Madison Street. If you make the check in payment of rent for month of May, it will be accepted.

Yours truly,

William T. Geary.

WTG/SK

Agent for Receiver"

In addition, counsel for plaintiff stated to the court that Geary was the agent for the receiver, handled the building, and that all rents were paid to him, as agent for the receiver, by defendant, and counsel further stated that the landlord had the right to elect, and that in the instant case the receiver did elect, by means of the letter of May 29. In view of plaintiff's attitude during the trial, she is not in a position, in this court, to contend that Geary did not have the authority to make the election that defendant claims he did. Plaintiff finally claims that even if it be conceded that Geary was authorized by the receiver to negotiate with defendant for double rent for the month of May, this would avail defendant nothing, as the offer of evidence shows that defendant did not abide by Geary's election, and therefore Geary had the right to make a further election to hold defendant as a hold-over tenant for an additional year. There is no merit in this

at what the plaintiff testified, but she could not recall in connection
with the plaintiff's testimony. (See Exhibit A, Plaintiff's Exhibit)
Exhibit A, Plaintiff's Exhibit, dated the 10th day of May, 1934.

Plaintiff contends that the testimony of Gentry is such that the alleged
allegation is not shown by the record. The objection to the alleged
evidence was a general one. However, plaintiff, in giving her

testimony, stated the following:

"WILLIAM F. GENTRY,
Room 2018 - 100 E. Wells Street
Chicago, Illinois 3774."

Chicago, May 10, 1934.

Chicago, May 10, 1934.
1000 EXHIBIT A
CHICAGO, ILLINOIS.

Enclosed
I herewith return to you the \$100.00 received from me
with your letter of this date.
I have placed in your hands for your account what is due
you for the month of May, 1934, for the month of May, 1934.
I have placed the check in payment of your account
of May, 1934, it will be accepted.

Yours truly,
William F. Gentry,
Room 2018 - 100 E. Wells Street
Chicago, Illinois 3774."

In addition, plaintiff's Exhibit A is the letter of May 10, 1934,
from Gentry to the receiver, bearing the date, and that all money
were paid to him, as agent for the receiver, by defendant, and counsel
therefor stated that the landlord had the right to eject, and that in
the instant case the receiver did eject, by means of the letter of May
10, 1934. In view of plaintiff's exhibits during the trial, she is not in
a position, in this court, to contend that Gentry did not have the

authority to make the ejectment from defendant's premises. Plaintiff
likewise claims that even if it be conceded that Gentry was authorized by
the receiver to make the ejectment from defendant's premises, that the month
of May, 1934, this would avail defendant nothing, as the offer of evidence
shows that defendant did not give up Gentry's services, and therefore
Gentry had the right to make a further objection to his defendant as a
landlord, and demand for an additional year. There is no merit in this

contention. The right of election belongs to the landlord and not to the tenant, and the election made by the landlord cannot be rebutted by proof of a contrary intention on the part of the tenant; and proof of an election by the landlord can be rebutted only by proof of a contrary intention on his part or on the part of the landlord and the tenant. (See Weber v. Powers, supra, pp. 282-3.) We are satisfied that the trial court erred in excluding the offered evidence, and as defendant vacated the premises on May 29, 1931, plaintiff, under defendant's theory of fact, would be entitled to a judgment for double rent for the use of the premises during the month of May, or \$300. The trial court allowed plaintiff judgment for \$1,200 upon the theory of fact that plaintiff was a holder for another year at a monthly rental of \$150.

For the error of the trial court in refusing to admit the evidence offered by defendant, the judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

[illegible]

37676

ROBERT C. HOOPER,
Appellee,

v.

SCOTTISH UNION & NATIONAL
INSURANCE COMPANY, a
corporation,
Appellant.

19 4
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

279 I.A. €19³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in assumpsit upon a fire insurance policy. A jury returned a verdict for plaintiff in the sum of \$1,680. Defendant appeals from a judgment entered upon the verdict.

Defendant has assigned and argued ten points in support of its general contention that the judgment should be reversed. From our view of the case we need consider but one of the points raised. Defendant contends that the trial court seriously prejudiced its rights "by undue participation in the trial, in examining and cross examining defendant's witness, and in comment and remarks conveying to the jury the Court's opinion of witnesses and evidence in the case." As bearing upon its argument in support of this contention defendant cites many pages of the bill of exceptions. The answer of plaintiff to the instant contention is that "the Court naturally was exasperated by the failure of counsel to produce any meritorious defense and although we do not like to accuse counsel of seeking to produce error in the record by provoking comment by the Court for the purpose of further delay, yet to all intents and purposes that was the apparent objective. Counsel cannot complain of that which was the result of his own conduct.

WILLIAM C. BROWN,
Appellant.

JOHN W. BROWN & SONS,
Appellees.

229 I.A. 619

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

MINISTERS were retained in accordance with a fine
insurance policy. A jury returned a verdict for plaintiffs in
the sum of \$1,000. Defendants appeal from a judgment entered
upon the verdict.

Defendant has assigned and argued ten points in support
of its general contention that the judgment should be reversed.
From our view of the case we need consider but one of the points
raised. Defendant contends that the trial court erred in

prejudging the rights "by undue participation in the trial, in
examining and cross examining defendant's witness, and in comment
and remarks conveying to the jury the Court's opinion of witnesses
and evidence in the case." As having upon its argument in support
of this contention defendant cites many pages of the bill of excep-
tions. The nature of plaintiff's contention is that
"the Court naturally was exasperated by the failure of counsel to
produce any responsive defense and although we do not like to
accuse counsel of seeking to produce error in the record by pro-
voking comment by the Court for the purpose of further delay, yet
in all instances and purposes that was the apparent objective. Counsel
cannot complain of that which was the result of his own conduct."

Absolutely none of these comments were provoked by appellee or his counsel, nor was any ruling brought forth at the instigation of plaintiff's counsel. Plaintiff was not at fault in any regard and should not suffer for things provoked by defendant's counsel." In considering the many statements and actions of the trial court of which defendant complains, we have kept constantly in mind plaintiff's position in reference to the trial court's conduct, but, under the record, we are unable to excuse the acts of the trial court upon the ground urged by plaintiff. In our opinion, counsel for defendant only sought to protect the rights of his client. It would serve no useful purpose for us to cite the many actions of the court of which defendant complains. That defendant was seriously prejudiced by the conduct of the trial court cannot be questioned. Indeed, plaintiff does not argue to the contrary. The contention that defendant was without any meritorious defense is not borne out by the record, and in our opinion justice requires a retrial of this case. While a number of the alleged errors argued are not likely to occur upon another trial, we may say that special interrogatories Nos. 1 and 4 that defendant requested the court to require the jury to answer should have been submitted to the jury.

Plaintiff has made a motion in this court to strike defendant's abstract of record from the files, which motion was reserved to the final hearing. The motion will be denied.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

[illegible]

37717

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

ABE PONCHER,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

279 I.A. 619⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant, Abe Poncher, was prosecuted in the Municipal court of Chicago upon an information which contains the following charge: "That Abe Poncher heretofore, to-wit: on the 3 day of February, A. D. 1933, at the City of Chicago aforesaid did then and there unlawfully offer for sale and did sell a certain Motor vehicle, to wit an Automobile the original motor number of which had been defaced and altered. In viol par 236 ch. 121 R. S. 1933," etc. In a trial by the court, a jury having been waived, defendant was found guilty and was sentenced to imprisonment in the county jail for a period of 180 days.

The statute covering the instant charge (Cahill's Ill. Rev. St., 1933, ch. 95a, par. 36) reads as follows:

"Par. 36. Possession or sale of vehicle with altered engine number or without any engine number- Designation of number by secretary of state- Seizure of vehicle- Prosecution.) Sec. 35. Any person or persons, firm or corporation, who, after the taking effect of this Act shall sell or offer for sale in this State, or who shall own or have the custody or possession of a motor vehicle, the original engine number of which has been destroyed, removed, altered, covered, or defaced, or who shall sell or offer for sale, own or have the custody or possession of a motor vehicle having no engine number, excepting electrically propelled motor vehicles, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for a term of not less than thirty days nor more than one hundred

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1. *Journal of the American Medical Association*, 1997; 277: 1001-1005.

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Journal of Management Education 33(1)

THE UNIVERSITY OF CHICAGO PRESS

Report of the Commission on the Administration of the Court of Appeals, 1911-1912, p. 10.

the county jail for a period of 120 days.

THE STATE OF NEW YORK
IN SENATE
JANUARY 11, 1906.

[illegible]

eighty days, or by both such fine and imprisonment, and upon a second conviction under this section the punishment shall be imprisonment in the penitentiary for a term of not less than one year nor more than five years; * * *

Defendant relies upon a number of points for reversal of the judgment, but from our view of the case we need consider only one. Defendant contends that the information is fatally insufficient because it does not aver acts constituting a violation of the statute so as to advise him of the nature ~~and manner~~ of the accusation, and, further, that the record of his acquittal or conviction under the instant information would not be a bar to a subsequent prosecution for the same offense. Defendant's major point is that the information should have alleged the person to whom the offer to sell and sale were made. That the information is fatally defective in that regard appears clear from a recent decision of the Supreme court. (People v. Brown, 336 Ill. 257. See also People v. Clavey, 355 Ill. 388, 365, 366.) The cases cited by the People, People v. Glassberg, 326 Ill. 379, and Young v. The People, 193 Ill. 236, hold that all exceptions that go merely to the form of an indictment should be made before the trial. Defendant also argues that the information is fatally defective for failure to allege the original engine number altered or changed; that such allegation was necessary in order to enable defendant to plead former jeopardy as a bar to any subsequent prosecution for the same offense. We cannot agree with this contention. Whether or not defendant would have been entitled to obtain the original number by means of a motion for a bill of particulars is not before us for consideration, as no such motion was made by defendant. Defendant also argues that the information is fatally defective for failure to negative the exception embraced in said paragraph. There is no merit in this contention. The paragraph provides for two distinct offenses and the exception does not relate to the first offense, and defendant is charged with a violation of

There are two main types of equipment used in the field of forensic science. The first type is the equipment used for the collection and preservation of evidence. This includes items such as evidence bags, evidence markers, and evidence containers. The second type is the equipment used for the analysis of evidence. This includes items such as microscopes, spectrometers, and chromatographs.

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Woods v. Lashburne, 208 Ill. 673, 97 N.E. 2d 111, 112 S.W.2d 111.

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that the information is being delivered to the public in a timely manner.

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no telephone, several people are included in address of note in Vancouver

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as made by defendant. Defendant also argues that the indictment is

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

is relatively a new regime in contrast to the old one

that offense. We must not be understood as holding that if defendant had been charged with a violation of the second offense that it would have been necessary for the information to negative the exception. (See People v. Semmler, 345 Ill. 272, 274.)

The judgment of the Municipal court is reversed, and as the People may see fit to amend the information and have a second trial of the case, the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

that witness, in fact, was not subjected to questioning that is
discussed has been changed with a violation of the sacred office
that it could have been necessary for the information to negative
the conclusion. (See Exhibit 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 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2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 22

37239

WABASH RAILWAY COMPANY,
Plaintiff in Error,

v.

GUS DREYFUSS,
Defendant in Error.

21
ERROR TO MUNICIPAL
COURT OF CHICAGO.

279 I.A. 6201

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Wabash Railway Company, brought this fourth class contract action in the Municipal court against Gus Dreyfuss, defendant, to recover \$499.80, which it claimed represented defendant's indebtedness to it as the balance of carrier charges due upon a shipment of hides made by the Southwestern Hide Company from Laredo, Texas, to Chicago, Illinois, April 2, 1931. Plaintiff alleged in its statement of claim that through an error in extending the charges for this shipment on its records it originally forwarded to defendant its bill for \$391.36, which he immediately paid; and that, when its error was discovered within a few days and a corrected statement of the carrier charges sent to him, he refused to pay the balance. The jury found the issues for defendant, and, after overruling plaintiff's motions for a new trial and in arrest of judgment, the court entered judgment against plaintiff for costs. This writ of error is brought to reverse the judgment.

It is conceded on page 16 of plaintiff's brief that, in as much as no bill of exceptions is included in the record brought to this court, assignments of error predicated upon the admission or exclusion of evidence, the giving of instructions or the refusal to give them or any other alleged erroneous conduct of the court in the trial of this cause, cannot be considered or reviewed by

WABASH RAILWAY COMPANY,
Plaintiff in Error,

v.

THE SHOOTING,
Defendant in Error.

IN SENATE

COMMITTEE ON COMMERCE

10000 I.A. 620

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff, Wabash Railway Company, brought this lawsuit against the defendant, The Shooting, to recover \$400.00, which it claimed represented the charges for the shipment of a certain quantity of goods. The defendant, The Shooting, claimed that the plaintiff was not entitled to the charges because the goods were not shipped in accordance with the terms of the contract. The plaintiff claimed that the defendant was liable for the charges because the goods were shipped in accordance with the terms of the contract. The court found in favor of the plaintiff and awarded the damages of \$400.00. The court also awarded the plaintiff its costs and attorney's fees. The defendant appealed the judgment of the court. The Supreme Court affirmed the judgment of the court.

this court.

The questions then presented for our determination are whether the trial court erred (1) in denying plaintiff's motion to vacate the judgment; (2) in denying plaintiff's motion to correct the record to show that the judgment was entered March 11, 1932, rather than March 10, 1932; (3) in denying plaintiff's several motions for further extensions of time for the filing of its bill of exceptions; and (4) in denying plaintiff's petition in the nature of a bill in equity to vacate the judgment.

As to the first question it need only be said that in the absence of a bill of exceptions this court cannot review the order of the trial court of March 18, 1932, denying plaintiff's motion of that date to vacate the judgment. The motion was made within apt time (less than 30 days after the judgment order) and was supported by plaintiff's counsel's affidavit asserting various grounds upon which the judgment should be vacated, but without a bill of exceptions this court is powerless to disturb the order of the trial court for the alleged abuse of its discretion in denying such motion. The sworn statement of plaintiff's counsel as to what transpired during the trial cannot be considered as a legal substitute for a bill of exceptions.

Plaintiff's claim that the court erred in denying its motion to correct the record as to the date of the entry of the judgment is without merit. The record shows the judgment to have been entered March 10, 1932. Plaintiff's motion to correct, supported by its counsel's affidavit, was entered and denied June 22, 1932. Plaintiff concedes and recognizes on page 36 of its brief that the affidavit of its counsel was insufficient in law to authorize the court to correct the record, but insists that because the edition of March 10, 1932, of the publication known

this court.

The questions then presented for our consideration are whether the trial court erred (1) in denying plaintiff's motion to vacate the judgment; (2) in denying plaintiff's motion to correct the record to show that the judgment was entered March 12, 1932, rather than March 10, 1932; (3) in denying plaintiff's several motions for further extension of time for the filing of its bill of exceptions; and (4) in denying plaintiff's petition in the nature of a bill in equity to vacate the judgment.

As to the first question it need only be said that in the absence of a bill of exceptions this court cannot review the error of the trial court at March 10, 1932, denying plaintiff's motion at that date to vacate the judgment. The motion was made within the time limit then in force (the judgment being) and was supported by plaintiff's counsel's affidavit requesting review of the record which the judgment should be vacated, but without a bill of exceptions this court is powerless to disturb the order of the trial court for the alleged abuse of its discretion in denying such motion. The sworn statement of plaintiff's counsel as to what transpired during the trial cannot be considered as a legal substitute for a bill of exceptions.

Plaintiff's claim that the court erred in denying the motion to correct the record as to the date of the entry of the judgment is likewise meritless. The record shows the judgment to have been entered March 12, 1932. Plaintiff's motion to correct, supported by the counsel's affidavit, was entered and denied June 12, 1932. Plaintiff's counsel and respondent on page 38 of the brief filed the affidavit of the counsel was insufficient in law to authorize the court to correct the record, but indicate that because the entry of March 10, 1932, of the judgment known

as the Municipal Court Record showed this cause to have been the first case on the trial call of Judge Borrelli, the trial judge, for March 11, 1932, that fact is conclusive that the judgment was entered March 11, 1932, instead of March 10, 1932. It is undisputed that the trial of this cause commenced March 10, 1932. It is a matter of common knowledge that reporters for the Municipal Court Record, in preparing their reports on court calls, necessarily have to secure their information concerning same early in the afternoon for their paper, which is published on the evening of each court day; and we may readily assume that, when the reporter visited the court room of the trial judge in this cause to get the next day's trial call, he followed the customary and usual course in placing the case then actually on trial at the head of the following day's call. The appearance of this cause on Judge Borrelli's call for March 11, is not decisive that the trial of the case was not finished and judgment entered March 10, 1932. This is not the character of evidence upon which courts permit their records to be challenged or corrected. Neither a judgment nor the record of a court can be amended after the lapse of the term (30 days here) upon the mere recollection of the judge or the affidavit of a party to the cause. (Page v. Shields, 102 Ill. App. 375.) The record of the court imports absolute verity and a note or memorandum which would authorize its amendment after the adjournment of the term must necessarily have been a note or memorandum which can be said to have been made by the judge or pursuant to a requirement of the judge or of the law. (Wesley Hospital v. Strong, 233 Ill. 153.) A mere announcement in the Municipal Court Record of the anticipated position of this cause on the call of the trial judge does not satisfy the requirements of the law.

The third question raised by plaintiff is that the court

on the Municipal Court record shown this case to have been the
first case on the trial of Judge Keville, the trial judge,
by March 11, 1932, that fact is conclusive that the judgment was
entered March 11, 1932, instead of March 10, 1932. It is undisputed
that the trial of this case commenced March 10, 1932. It is a
matter of common knowledge that reporters for the Municipal Court
report, in preparing their reports on court calls, necessarily have
to secure their information concerning each case in the afternoon
for their report, which is published on the evening of each court
day; and we may readily assume that, when the reporter visited the
court room at the trial judge in this case to get the next day's
trial call, he followed the customary and usual course in placing
the case then actually on trial at the head of the following day's
call. The appearance of this case on Judge Keville's call for
March 11, is not conclusive that the trial of the case was not finished
and judgment entered March 10, 1932. This is not the character of
evidence upon which courts permit their records to be challenged or
corrected. Whether a judgment was the record of a court can be
ascertained after the lapse of the term (30 days here) upon the mere
recollection of the judge or the affidavit of a party to the cause.
(Part v. Smith, 100 Ill. App. 375.) The record of the court
imports absolute verity and a note or memorandum which would authorize
its amendment after the adjournment of the term must necessarily have
been a note or memorandum which can be said to have been made by the
judge or returned to a recollection of the judge at or after the law.
(Wright v. Wright, 225 Ill. 181.) A note or memorandum in
the Municipal Court record at the anticipated position of this cause
on the call of the trial judge does not satisfy the requirements
of the law.

The third question raised by plaintiff is that the court

erred in denying its several motions for further extensions of time for filing its bill of exceptions and we find it to be equally without merit. When the judgment was entered March 10, 1932, plaintiff prayed an appeal and was allowed sixty days to file its bill of exceptions. It appears from plaintiff's counsel's affidavits that May 8, 1932, the parties filed with the clerk of the Municipal court a written stipulation to extend plaintiff's time for filing its bill of exceptions twenty days. This extension was not sanctioned by the court and no order allowing it appears of record. May 28, 1932, the court allowed plaintiff an extension of ten days. June 9, 1932, plaintiff's motion for a further extension was denied. It will be noted that, conceding to plaintiff the stipulated twenty day extension of May 8, 1932, not allowed by order of the court, it had ninety days within which to file its bill of exceptions. The trial court held that the ninety days having elapsed June 8, 1932, it was without jurisdiction on June 9, 1932, to grant any further extension of time. It was only after its motion of June 9, 1932, had been disallowed that plaintiff sought on June 22, 1932, to amend the record as to the date of the judgment in the manner and with the result heretofore indicated. Its obvious purpose in seeking to amend the date of the judgment to March 11, 1932, was to have its extended time for filing its bill of exceptions expire on June 9, 1932.

Notwithstanding the court's order of June 9, 1932, denying it a further extension of time, plaintiff persisted in presenting similar motions June 22, 1932, and July 22, 1932, and on October 31, 1933, it presented a bill of exceptions for approval with its motion for leave to file same, all of which motions were properly denied. That the recognized and established rule is, that after the expiration of the time allowed for filing a bill of exceptions, a trial court

order is being; its several motions for further extension of time for filing its bill of exceptions and its time to be specially without merit. And the judgment was entered March 10, 1933, plaintiff moved on appeal and was allowed sixty days to file the bill of exceptions. It appears from plaintiff's account of the litigation that May 2, 1933, the motion filed with the clerk of the District Court a notice of appeal to the District Court was filed with the bill of exceptions twenty days. This extension was not mentioned by the court and no order allowing its appeal of record. May 11, 1933, the court allowed plaintiff an extension of the bill of exceptions twenty days. Plaintiff's motion for a further extension was denied. It will be noted that, according to plaintiff the stipulated twenty day extension of May 2, 1933, was allowed by order of the court, it had already been within which to file the bill of exceptions. The trial court held that the ninety days having elapsed June 2, 1933, it was without jurisdiction on June 2, 1933, to grant any further extension of time. It was only after the motion of June 2, 1933, had been discussed that plaintiff sought an order on June 11, 1933, to amend the record as to the date of the judgment in the amount and with the result heretofore indicated. The motion was granted in seeking to amend the date of the judgment to March 11, 1933, was to have its extended time for filing the bill of exceptions expire on June 11, 1933.

Reaffirming the court's order of June 7, 1933, finding that a further extension of time, plaintiff requested in paragraph 11, similar motions June 28, 1933, and July 22, 1933, and on October 11, 1933, it presented a bill of exceptions for approval with the motion for leave to file same, all of which motions were properly denied. That the recognized and established rule is, that after the expiration of the time allowed for filing a bill of exceptions, a trial court

is without jurisdiction to either approve such bill of exceptions or to further extend the time for filing same, requires no citation of authorities.

Plaintiff earnestly and vigorously complains of defendant's fraudulent conduct and of the manifest errors of the trial court in the trial of this cause, but it is sufficient to state that plaintiff was afforded ample opportunity to preserve by a bill of exceptions all of such alleged errors for review by this court. The case was tried, according to the record, in one day, and it is difficult to understand why plaintiff's counsel could not have prepared and presented its bill of exceptions to the trial court for approval and for filing within the ninety days allowed.

It is also urged in one of its counsel's affidavits that May 24, 1932, plaintiff turned over its bill of exceptions to defendant's attorneys for examination and approval or correction with the understanding and agreement that it was to be returned for settling and approval by the court June 8, 1932, and that they willfully refused to return same. We find no substantiation for this contention in the record and it is sufficient to state that if defendant's attorneys were guilty of any such conduct the court was available for redress.

September 9, 1932, plaintiff filed a petition in the nature of a bill in equity to vacate the judgment. We are of the opinion that the court was justified in refusing to consider this petition. Section 21 of the Municipal court act gives to the Municipal court power to vacate a judgment on such a petition only in cases where no motion to vacate is made within thirty days after the entry of the judgment, and in this case such motion was made and denied within thirty days from the entry of the judgment. (Flora v. Fields, 136 Ill. App. 341.) An order denying a motion made within thirty days after its entry

to vacate a judgment of the Municipal court is final and no subsequent motion to vacate it will lie, but the only method of reviewing it is by appeal or writ of error. (Gellins v. Grab, 209 Ill. App. 447.)

Such other points as have been urged, we think, have been fully covered by our discussion of the foregoing contentions.

Defendant's motion to dismiss this writ of error, reserved to final hearing, is denied.

Finding no reversible error in the record, the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

It is the policy of the Department of Justice to make available to the public, in accordance with the provisions of the Freedom of Information Act, all records and documents in its possession or control, unless they are exempt from disclosure under one or more of the exemptions provided in the Act. This document is being released under the provisions of the Act.

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with covered by the provisions of the foregoing paragraph.

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JOHN A. BENDER,
Appellee,

v.

H. H. SEFF ADVERTISING CO.,
et al.

On appeal of OUTDOOR
ADVERTISING AGENCY OF AMERICA,
Inc., Garnishee below, and
DOROTHY MARIE SEFF, Intervenor
below,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

279 I.A. 620^r

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a fourth class action in attachment in which John A. Bender is plaintiff, the H. H. Seff Advertising Company, Inc., (hereinafter referred to as the Seff Company) is defendant, and the Outdoor Advertising Agency of America, Inc., (hereinafter referred to as the Outdoor Company) is garnishee. After a judgment for \$971.03 was entered against the principal defendant December 16, 1932, a rule was entered against the garnishee to answer, which it did December 31, 1932, asserting that it was not indebted to the Seff Company June 14, 1932, the date of the service of the garnishee summons upon it, nor since that time. Plaintiff filed his notice of contest of this answer October 11, 1933. An order was entered January 5, 1934, for a rule upon plaintiff to notify the adverse claimant, Dorothy Marie Seff (hereinafter referred to as Mrs. Seff), an officer of the Seff Company, as well as the wife of Harry H. Seff, its president and general manager, to appear and defend as intervening petitioner

on or before January 15, 1934. Mrs. Seff filed her intervening petition February 27, 1934, alleging an assignment to her by the Seff Company of the money due it from the garnishee upon a certain advertising posting contract.

Upon the trial of the issues by the court without a jury the following finding was entered:

"The court finds the issues versus adverse claimant Marie Seff and for plaintiff as to nine hundred seventy one and 03/100 dollars (\$971.03) in hands of garnishee, Outdoor Advertising Agency of America, a Corp."

After overruling motions of the adverse claimant and ^{the} garnishee for a new trial and in arrest of judgment, the court entered judgment upon the finding February 28, 1934, against the garnishee for \$971.03. This appeal followed.

Plaintiff's judgment against the principal defendant, then engaged in business in Akron, Ohio, was based upon his claim for salary and commissions for work and services performed for it while in its employ.

About June 17, 1932, the garnishee summons was forwarded by the Chicago office of the Outdoor Company to R. T. M. McGready, general counsel of garnishee, at Pittsburg, Pennsylvania, who advised the treasurer of the company to make no further payments on the Seff Company contract until further instructions were received from him. July 30, 1932, Harry H. Seff, president of the Seff Company, mailed to McGready a copy of the alleged assignment of the interest of that company in the posting contract and advised him that, pursuant to the terms of the assignment, Mrs. Seff desired that thereafter payments on the contract be made to her. Thereupon McGready, notwithstanding and disregarding the fact that this cause was then pending in the Municipal court, advised the garnishee to make the balance of the payments on the contract to her, which it did, forwarding to her four checks

for \$368 each.

Both the intervenor and ^{the} garnishee contend (1) that the assignment was given to the assignee (intervenor) by the judgment debtor (Seff Company) in good faith and for a valuable consideration, and that the garnishee was justified in honoring the assignment and paying the funds to the assignee; (2) that, the judgment debtor having been adjudicated a bankrupt, the trial court should have directed that notice of the pendency of the garnishment action be sent to the trustee in bankruptcy of the Seff Company under the provisions of section 11 of the Garnishment Act; and (3) that the trial court erred in entering judgment against the garnishee without a finding of fact as to the issue raised by the contest of the garnishee's answer of "no funds."

Plaintiff's theory is that the alleged assignment from the judgment debtor to the intervenor was not made in good faith nor for a valuable consideration, and that the garnishee was not warranted in honoring such assignment and paying the funds to the alleged assignee.

As to the second contention of the garnishee and the intervenor it is only necessary to state that it was effectually disposed of in the trial court by the order appearing on page 57 of the record, reciting that the parties to this cause had stipulated that "all testimony relative to bankruptcy or by bankruptcy officials be stricken."

As to their third contention it is sufficient to state that the court found "the issues * * * for plaintiff as to * * * \$971.03 in the hands of garnishee, Outdoor Advertising Agency of America, a corporation," which it had wrongfully paid to Mrs. Seff after the summons in garnishment had been served upon it.

for that date.

Both the intervenor and the defendant (I) state

the assignment was given to the assignee (intervenor) by the
defendant (Bell Company) in good faith and for a valuable
consideration, and that the defendant was justified in honoring
the assignment and paying the funds to the assignee; (2) that

the defendant's action having been adjudicated a breach of the
contract should have directed that notice of the payment of
the defendant's action be sent to the assignee in conformity of

the law company under the provisions of section 12 of the
Contract Act; and (3) that the trial court erred in entering
judgment against the defendant without a finding of fact as to
the issue raised by the content of the defendant's answer of

"no funds."

The defendant's theory is that the alleged assignment from

the defendant to the intervenor was not made in good faith
and for a valuable consideration, and that the defendant was not
entitled to honor such assignment and paying the funds to the
intervenor.

As to the second contention of the defendant and the
intervenor is in only necessary to state that it was effectively
disposed of in the trial court by the order of paying on page
77 of the record, reciting that the parties to this cause had
agreed that "all business relative to bankruptcy of the

defendant should be withdrawn."

It is held that defendant is not entitled to
state that the said funds "all funds" as the plaintiff is to
state that the funds "all funds" without reciting
"and of interest, a corporation," and (4) that defendant's
action after the payment in bankruptcy has been served

It is only necessary then to consider the first or major contention of the garnishee and the intervenor that the finding of the trial court that the assignment in question was not made in good faith nor for a valuable consideration and that the garnishee was not justified in honoring the assignment was against the manifest weight of the evidence.

D. O. Ballou, a salesman and plant inspector for the Outdoor Company, testified, substantially, that his company had a contract with the Shell Oil Company to display certain advertising for it in the City of Akron, Ohio; that the display posters were already printed and that it was only necessary to have them posted on billboards to be selected; that two companies were in that business in Akron; that he went there between April 15 and 20, 1932, and discussed the proposition with Harry H. Seff, president of the Seff Company, the judgment debtor; that he advised Seff of his desire to give the Seff Company the contract for the posting, but was hesitant to do so because of its precarious financial condition; that Seff assured him that his wife would advance the funds to finance the Shell contract if it was assigned to her to secure repayment of such funds advanced; that Seff took him to his apartment and "in front of me asked Mrs. Seff if she was going to finance this contract provided he received it from our office, and if she would do that, why, she would be satisfied with the assigning of the contract;" that he returned to his Chicago office and made his report and recommendation both to the Chicago and New York offices of the garnishee; that thereafter it was decided to let the contract to the Seff Company and same was drawn and forwarded to it; that the contract was returned properly executed; that "there was no assignment at that time - it was proposed;" that the contract provided for the payment to the Seff Company of \$360.68 for May, 1932, and \$368 each for the

It is only necessary then to consider the time or
major contention of the witnesses and the interview that the
finding of the trial court that the assignment in question was
made in good faith not was a valuable consideration and
that the assignment was not justified in honoring the assignment
was against the weight of the evidence.
D. O. Nelson, a witness and plant inspector for the
Portland Cement Co., testified substantially that his company had
a contract with the Portland Cement Co. to supply certain materi-
als for it in the city of Portland, Oregon; that the company's
ware already existed and that it was only necessary to have them
placed on billboards to be released; that two companies were in
that business in Portland; that he went there between April 15 and 20,
1911, and discussed the proposition with Henry E. Holt, president
of the Portland Cement Co., and learned that he advised Holt at
his desire to give the Portland Cement Co. the contract for the Portland
plant was hesitant to do so because of the previous financial condi-
tion; that Holt assured him that his wife would advance the funds to
finance the plant contract if it was assigned to her to secure re-
payment of some funds advanced that Holt said was his assignment
and that Holt at the same time, Holt it was going to finance this
contract provided he received it from one office, and it was would
be paid, and he would be satisfied with the execution of the con-
tract; that he returned to his company office and made his report
and recommended that the contract be let the Portland Cement Co.
contract that assignment it was decided to let the contract to the
Portland Cement Co. and that the contract was let to the Portland
Cement Co. and that the contract was let to the Portland Cement Co.
and that the contract was let to the Portland Cement Co.

months of June, July, August and September, 1932; and that neither the Seff Company nor Mrs. Seff knew anything about the Shell contract until he breached it to Seff and Mrs. Seff between April 15 and 20, 1932.

H. H. Seff testified "that the contract will be properly carried out because Dorothy M. Seff had agreed to advance the money for the performance of the contract, with the understanding that the contract would be assigned to her as security." He further testified that Mrs. Seff not only financed this contract but advanced other sums to take care of the general business of the Seff Company before the Shell contract was even heard of, as well as after it was discussed and entered into, and that it was agreed that all such advances would be covered by the assignment in question.

Mrs. Seff testified that, "He (her husband) wanted me to finance the Shell account and he would assign the account to me and I told him that I would not advance money into this company unless I was given protection and security for these advances, as I did not want to throw my personal money into the company and have it lost." She also testified that she had made other advances to the company to aid it in carrying on its general operations and that the conversation between Ballou and her husband and herself, which Ballou said occurred between the 15 and 20 of April, 1932, took place early in May after the alleged assignment had been executed.

The original contract between the Outdoor Company and the Seff Company is not in evidence, but the alleged original assignment of April 28, 1932, is, and it sets forth that the original contract was executed April 16, 1932. A careful consideration of all the evidence inclines us to believe that

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that all such expenses would be covered by the settlement in
as after it was discussed and entered into, and that it was agreed
that agency before the Bell contract was even heard of, as well
advanced other sums to take care of the general business of the
testified that Mrs. Bell not only financed this contract but
the contract would be assigned to her as security." He further
for the performance of the contract, with the understanding that
surrendered out because Dorothy M. Bell had agreed to advance the money
M. M. Bell testified "that the contract will be properly

—James H. Thompson

which Ballou said occurred between the 15 and 20 of April, 1933, had the conversation between Ballou and her husband and herself, the company to aid it in carrying on its general operations and "give it fuel." She also testified that she had made other advances and I did not want to throw my personal words into the company and witness I was given protection and security for these advances, and I told him that I would not advance money into this company to finance the shell account and he would assign the account to me. Mrs. Ball testified that, "he (her husband) wanted me

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The official records between the Chinese Embassy and the U.S. Embassy in Beijing, dated April 15, 1950, are as follows:

consideration of all the evidence in order to believe that

the original contract was not executed April 16, 1932, but on a date considerably later. The record is silent as to the identity of the officers, directors and stockholders of the Seff Company, other than Harry H. Seff and his wife. No notice of the assignment of the Seff Company's interest in the revised contract of April 23, 1932, having been given to the garnishee prior to the service of summons upon it at its Chicago office June 14, 1932, the Outdoor Company, on that date, forwarded its check for \$360.64 for the first payment due under the contract to the Seff Company from its New York office, which Harry H. Seff testified he thereafter turned over to Mrs. Seff.

The record discloses the following copy of a letter written by McCready to the Seff Company:

"July 30, 1932,

H. H. Seff, President,
The H. H. Seff Advertising Company,
Akron, Ohio.

Dear Sir:

Outdoor Advertising Agency of America, Inc., has referred to me as their attorney your letter of July 25th, I regret to be obliged to advise that your account is of necessity held up in the hands of OAA by reason of the attachment of which you have had notice. This was a foreign attachment served at the Chicago office of OAA in the suit of John A. Bender in which he claims \$1000. This attachment was issued out of the Municipal Court of Chicago.

If you have an attorney in Chicago that you would like to employ to try to have this attachment disposed of in a legal way I will be glad to cooperate with such an attorney if you will give me his name and address.

Yours truly."

It will be noted that McCready's letter refers to a letter of July 25, 1932, from H. H. Seff, president of the Seff Company, to the Outdoor Company, not in evidence, and, from the tenor of McCready's reply, it is logical to infer that Seff's letter demanded the resumption of payments upon the Shell contract. From the readiness and willingness of the garnishee to honor the alleged assignment of the Shell contract to Mrs. Seff, when a copy of it was received a short time later, it is also logical

to infer that Seff's letter of July 25, 1932, to McCready neither convincingly urged any such alleged assignment nor enclosed a copy of same. Then when no other means would apparently avail to procure the resumption of payments by the garnishee in the face of the pending garnishment action, we find Seff writing McCready July 30, 1932, the following letter, enclosing a copy of the purported assignment by the Seff Company to Mrs. Seff of the Shell contract of April 28, 1932:

"Mr. R. T. M. McCready,
Attorney at Law,
240 Fifth Avenue,
Pittsburgh, Pa.

Dear Mr. McCready:

Enclosed find copy of the assignment which was made to Dorothy Marie Seff. You will note the terms state the checks may be made payable to either the company or herself, at her discretion, and that notification to the debtor is waived.

Under these circumstances, it is not necessary for D. M. Seff or The H. H. Seff Adv. Co. to notify the Outdoor Advertising Agency of America in writing that their account was assigned; however, such notification was given in person when their representative was here at the time the contract was placed. (italics ours.)

We have since been notified by D. M. Seff to have this check made payable to her.

Very truly yours,
THE H. H. SEFF ADV. CO.
Harry H. Seff,
President."

The copy of the purported assignment enclosed is as follows:

"Assignment.

Akron, Ohio, April 30, 1932.

For one dollar and other valuable considerations, we the undersigned, hereby sell, assign and transfer all right, title and interest to the attached revised contract #20243, dated April 28th, 1932, from OUTDOOR ADVERTISING AGENCY OF AMERICA, INC., for poster advertising in the City of Akron, Ohio, for a period of five months for which monthly payments are to be made in the sum of \$441.60, less a commission of 16-2/3% to DOROTHY M. SEFF of 753 W. Market Street, Akron, Ohio, at the option of DOROTHY M. SEFF.

We hereby agree to notify the OUTDOOR ADVERTISING AGENCY OF AMERICA, INC., that monthly payments be made to said DOROTHY M. SEFF, and we hereby agree to turn over all moneys made payable in checks for payments due under this contract for outdoor advertising which checks may be made payable to

The H. H. Seff Advertising Company, unless Dorothy Marie Seff exercises her option to have notification given to the Outdoor Advertising Agency of America, Inc.

THE H. H. SEFF ADVERTISING CO.,
By Harry H. Seff, President."

The italicized portion of Seff's letter is refuted by the testimony of Ballou that when he discussed the matter with Seff and his wife, not only had no assignment of the contract been executed but the contract itself was not in existence, and that it was only proposed that, if Mrs. Seff financed the Shell contract, the Seff Company would assign it to her when executed as security for such financing.

After McCready received Seff's letter of July 30, 1932, he immediately advised the garnishee to complete the payments on the contract to Mrs. Seff, which it did, paying her \$1,472 in addition to the \$360.64 previously paid to the Seff Company.

In view of the alacrity with which the alleged assignment was honored by the garnishee, it is difficult to understand why, if it was actually in existence during the period from the time the payments were stopped on the contract, about the middle of June, 1932, until July 31 or August 1, 1932, when it reached McCready and was honored, it was not produced earlier. McCready testified that Seff called on him at his office in Pittsburgh demanding payment of the account to his wife and that Mrs. Seff urgently demanded payment. In his letter of July 25, 1932, Seff demanded payment. Yet no assignment or copy of an alleged assignment appears in the picture until Seff mailed it to McCready with his letter of July 30, 1932.

Although the garnishee paid \$360.64 to the Seff Company on the date that it was served with the garnishee summons and \$1,472 to Mrs. Seff during August and September, 1932, after such service of summons, ostensibly on the strength of the alleged

THE U. S. DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL
 WASHINGTON, D. C.
 JULY 22, 1932
 BY HENRY M. HOLT, Esq.

The following portion of Holt's letter is referred to in the testimony of Holt on that when he discussed the matter with Holt and his wife, not only had no assignment of the contract been executed but the contract itself was not in existence, and that it was not, perhaps that it was, Holt claimed the small amount, the very small amount which is in fact even smaller as actually for Holt himself.

After McGroarty received Holt's letter of July 22, 1932, he immediately advised the publisher to complete the payments on the contract to Holt, Holt did, paying the \$1,475 in addition to the \$200.00 previously paid to the Holt Company.

In view of the manner in which the alleged assignment was made by the publisher, it is difficult to understand why it is not material to determine during the period from the time the payments were stopped on the contract, about the middle of June, 1932, until July 21 or August 1, 1932, when it reached McGroarty and was honored, is not not proper either, entirely justified that Holt called on him as his wife in Pittsburgh demanding payment at the account to his wife and that Holt apparently demanded payment. In his letter of July 22, 1932, Holt demanded payment. The no assignment or copy of an alleged assignment appears in the picture until Holt called it to McGroarty with his letter of July 22, 1932.

Although the publisher paid \$200.00 to the Holt Company on the date that it was given with the original contract and \$1,475 on July 22, 1932, about mid September, 1932, when Holt called at McGroarty, originally as the amount of the alleged

assignment to her, it appears to have purposely refrained from relying on such assignment in its answer. It was not until February 27, 1934, that Mrs. Seff, although fully cognizant of this litigation, condescended to apprise the court in her intervening petition of the alleged assignment to her of the funds due under the contract, which plaintiff sought to reach by the instant proceeding.

In so far as the record discloses the Seff Company corporation was operated as a family affair by husband and wife, and it has repeatedly been held that the business of such a corporation cannot be so conducted as to furnish a mantle of protection to the family stockholders and officers when their dealings with the property of the corporation result in the fraudulent deprivation of the rights of creditors of the corporation.

Ballou testified, as did the Seffs, that the contemplated assignment of the Shell contract by the Seff Company to Mrs. Seff was to secure her for advances made by her to the company to finance that particular contract. That amount could not have exceeded \$700. There is no credible evidence in the record that the full amount due under the contract was to be assigned to her. Yet we find the Seffs, after plaintiff had commenced this action, attempting to pyramid Mrs. Seff's claim under the alleged assignment to a sum in excess of \$1,832, the full amount of the contract. It is incredible, considering the financial straits of the Seff Company, that its president would, in its behalf, assign the entire benefit accruing under the Shell contract, even to his wife, for the amount loaned by her to the company to finance it. Such an assignment would necessarily have to be held to be a fraud upon the creditors of the company. If any assignment was made to Mrs. Seff by the Seff Company on or about April 30, 1932, we are

assignment to her, it appears to have previously retained from
relying on such assignment in the power. It was not until
January 17, 1904, that the assignment was registered at
this litigation, consequently to require the court to hear in-
forming petition of the alleged assignment to her of the funds due
under the contract, which plaintiff sought to recover by the instant
petition.

In so far as the record discloses the Bell Company
corporation was operated as a family affair by husband and wife,
and it has repeatedly been held that the business of such a cor-
poration cannot be so conducted as to deprive a partner of protection
in the family stockholder and otherwise when their dealings with
the property of the corporation result in the fraudulent depletion
of the rights of creditors of the corporation.

Reliance testified, as did the Bell, that the contemplated
assignment of the Bell contract to the Bell Company in 1901
was to secure her for advances made by her to the company to
finance that particular contract. That amount would not have
exceeded \$500. There is no credible evidence in the record that
the full amount due under the contract was to be assigned to her.
Yet we find the Bell, after plaintiff had commenced this action,
attempting to procure Mrs. Bell's claim under the alleged assign-
ment as a new loan of \$1,000, the full amount of the contract.
It is inevitable, considering the fraudulent nature of the Bell
company, that the plaintiff would, in the belief, receive the
entire benefit accruing under the Bell contract, even to his
wife, for the amount loaned by her to the company to finance it.
Such an assignment would necessarily have to be held to be a fraud
upon the creditors of the company. If any assignment was made to
her, told by the Bell Company on or about April 22, 1904, we are

convinced that it was not the assignment received in evidence and relied upon by the intervenor and ^{the} garnishee in this cause.

The manifestation of overreaching on the part of the Seffs strengthens our opinion that this alleged assignment was not in existence June 13, 1932, when this proceeding was instituted, or June 14, 1932, when summons in garnishment was served upon the Outdoor Company. A careful inspection of the instrument must verify the suspicion that it was born of convenience and drafted in an attempt to meet the peculiar facts and circumstances of this case. It provides that "payments are to be made * * * to Dorothy Marie Seff * * * at the option of Dorothy Marie Seff. We hereby agree to notify the Outdoor * * * Agency * * * that monthly payments be made to said Dorothy Marie Seff, and we hereby agree to turn over all moneys made payable in checks * * * which checks may be made payable to H. H. Seff Advertising Company, unless Dorothy Marie Seff exercises her option to have notification given to the Outdoor * * *."

In her testimony Mrs. Seff indicated strongly that she would not trust the Seff Company with her money and stated that nothing short of an assignment of the contract as security for her money would satisfy her. Then, although the purported assignment specifies that the monthly payments are to be made to her directly and that the Seff Company agreed to notify the Outdoor Company to so make them, we are urged to believe that she accepted an assignment that further provided that the payments might be made payable to the Seff Company. In his letter of July 30, 1932, to McCready, Seff states: "You will note * * * that notification to the debtor is waived." On the contrary, the alleged assignment specifically provided that, "We (Seff Company) hereby agree to notify the Outdoor * * * Agency * * * that monthly payments be made

conviction that it was not the assignment received in evidence
and relied upon by the intervenor and ^{the} witnesses in this case.

The modification of overreaching on the part of the

Wells advertisement our opinion that this alleged assignment was
not in existence June 12, 1932, when this proceeding was instituted,

or June 14, 1932, when summons in garnishment was served upon the

Outdoor Company. A careful inspection of the instrument must

verify the suspicion that it was born of convenience and created

in an attempt to meet the peculiar facts and circumstances of this

case. It provides that "payments are to be made * * * to McGraw-

Hill Self * * * as the agent of McGraw-Hill Self, as hereby

agreed to notify the Outdoor * * * Agency * * * that monthly pay-

ments be made to said McGraw-Hill Self, and we hereby agree to

turn over all moneys made payable in checks * * * which checks may

be made payable to E. H. Self Advertising Company, unless McGraw-

Hill Self advises her agent to have notification given to the

Outdoor * * *."

In her testimony Mrs. Self indicated strongly that she

would not trust the Self Company with her money and stated that

nothing short of an assignment of the contract as security for

her money would satisfy her. Thus, although the proposed assign-

ment specifies that the monthly payments are to be made to her

directly and that the Self Company agreed to notify the Outdoor

Company to so make them, we are urged to believe that she accepted

an assignment that further provided that the payments might be made

payable to the Self Company. In his letter of July 20, 1932, to

McGraw-Hill Self states: "You will note * * * that notification to

the Outdoor is waived." In the contrary, the alleged assignment

specifically provided that "We (Self Company) hereby agree to

notify the Outdoor * * * Agency * * * that monthly payments be made

to said Dorothy Marie Seff."

The alleged assignment itself is a contradiction in terms. As heretofore stated the Outdoor Company received no notice of it until long after its purported execution and long after payments^{had} been discontinued because of the service of the garnishee summons upon it, the first payment under the contract having been made to the Seff Company. The only conceivable manner in which we can account for the strange verbiage of this instrument is that it was drawn in an attempt to fit the situation as it existed July 30, 1932. Under all the facts and circumstances of this case we find no justification in the record for the action of the Outdoor Company in making payments under the contract in question to either the Seff Company or Mrs. Seff after it had been served with the garnishee summons.

A careful examination of all the evidence in the record impels us to the conclusion that the trial court was entirely warranted in its finding and judgment, and that, in any event, considering the many improbabilities and inconsistencies in the evidence offered by the garnishee and intervenor, this court could not hold that the finding and judgment were against the manifest weight of the evidence.

This appeal was brought here under the Civil Practice Act, Cahill's Statutes, chapter 110, page 129, et seq., and it is urged that plaintiff's brief and argument should be stricken from the files of this court because he failed to file in the trial court his notice of appearance after appellants had filed there their notice of appeal as provided by rule 35 of the rules of practice and procedure adopted by our Supreme Court at its December, 1933, term. Plaintiff's counsel asserts that this is the first appeal under the new Civil Practice Act in which he

1. The first vessel is of

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action on various things: no one will be able to do it.

It is noted that the above information was obtained from the files of the FBI, and is being furnished to you for your information.

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There is no record of this instrument in the records of the Bureau of Land Management.

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Under all the tests and circumstances this case was found to conform to the above.

referred to the notice and not to the fact that the notice was not given.

There is no other person who is connected to the contract in connection to the contract.

The full history of the case will be told after it has been moved into the

• *Journal of the American Medical Association*

A careful examination of all the evidence in the record shows not only

It is also noted that the trial court was entirely

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and it is important to have a good understanding of the

Since mid-June, the investigation has been conducted by the following personnel:

all persons who should be notified and that they be given

negative add to defense activities

This report was prepared under the Civil Liberties

of the

added that "Clinton" and "Clinton" should be added to the list.

The title of this work becomes in Latin in the title

0% of 1951 had a 100% rate of increase in value and price

Their notice of removal is received by this office of the Bureau.

Revised and presented by our members since 1980

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participated; that he, being somewhat unfamiliar with the rules of court and the act itself governing appeals, sought advice and guidance from the office of the clerk of this court and followed it, and that his failure to file notice of his appearance in the Municipal court after notice of appeal resulted in no injury to appellants.

The Civil Practice Act was enacted to assist litigants in having their cases tried - not to keep them from trying their cases. We are not inclined to indulge in highly technical interpretations of this act - especially until it is generally and uniformly understood. Inasmuch as appellants suffered no injury by reason of plaintiff's failure to file such appearance in the trial court, the motion to strike plaintiff's brief and argument, reserved to hearing, is denied. (Schnorick v. Prudential Insurance Company, 377 Ill. App. 36.)

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

and followed it, and then the balance of the matter of his
 advice and guidance from the office of the chief of this court
 and the court and the set itself governing according to the
 jurisdiction; that he, being connected with the office with the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

[illegible]

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

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8 (1825-1826)

THOMAS J. L. ...

37537

FRED MEYER,
Appellee,

v.

LUDLOW TYPOGRAPH COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. C20³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an assumpsit action brought January 2, 1934, upon three corporate first mortgage bonds of \$1,000 each, all dated December 1, 1923, executed by defendant and payable to the bearer or his order December 1, 1933. Upon plaintiff's motion defendant's amended statement of defense was stricken on the ground that it was insufficient in law and did not state a defense. Defendant electing to abide by its statement of defense, an order of default was entered against it, plaintiff's damages were assessed at \$3,061.26, and judgment entered for that amount. This appeal followed.

Plaintiff's statement of claim alleged that December 1, 1923, defendant executed a series of first mortgage bonds aggregating \$300,000, payable to bearer at different maturities with interest at 7% per annum; that he is the owner of three such bonds of \$1,000 each; that all three bonds matured December 1, 1933, but have not been paid by defendant or anyone in its behalf; and that there is now due and owing him from defendant \$3,000. (Included in the statement of claim is a photostatic copy of one of the bonds.)

Defendant's amended statement of defense, after admit-

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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120 A.I. 972

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

This is an amended action brought January 2, 1934, upon these separate first mortgage bonds of \$1,000 each, all dated December 1, 1927, secured by deed and power of sale to the City of New York, dated December 1, 1927. Upon plaintiff's motion for summary judgment of title was granted. On the ground that it was immaterial in law and equity that a defense, defense of title to the property of defendant, as stated in detail was stated against it, plaintiff's demand was answered as follows, and judgment entered in favor of plaintiff. This record follows.

1. 1933, defendant executed a series of first mortgage bonds aggregating \$100,000, payable to bearer or order of the owner of three with interest at 7% per annum; that he is the owner of three such bonds of \$1,000 each; that all three bonds were issued in 1933, but have not been paid by defendant or anyone in his behalf; and that there is now due and owing him from defendant \$1,000. (Included in the statement of claim is a photostatic copy of one of the bonds.)

*style varies, reported to sometimes be more a "challenge"

ting the execution of the bonds and their maturities according to their terms, alleged that plaintiff is not entitled to maintain this action against it for the reasons, inter alia, below set forth:

"Each of the bonds described in the statement of claim specifies on its face that it is one of a series secured by a first mortgage or deed of trust of even date with said bonds, duly authenticated, acknowledged and delivered, conveying the property and assets of the Ludlow Typograph Company then owned or which may thereafter be acquired by said Corporation, including real estate in Chicago, Cook County, Illinois. Each of said bonds also contains, inter alia, the following:

"Reference is hereby expressly made to said trust deed for a particular description of the terms and conditions thereof on which said bonds are issued and secured; and for a description of the nature and extent of the security therefor; and the rights of the bondholders with regard to such security."

"Said trust deed (Article XVIII) provides as follows:

"It is hereby declared and agreed as a condition upon which each successive holder of all or any of said bonds, and all or any of the coupons for the interest on said bonds, receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceedings in equity, of any character or kind, for the foreclosure of this Indenture, or for the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this mortgage or deed of trust, or the lien hereby created, or otherwise, without first giving notice in writing to the Trustee of default having been made and continued as aforesaid, and unless the holders of one-fifth (1/5) of the amount of the then outstanding bonds have in writing notified and requested the said Trustee as above provided (and a reasonable opportunity has been afforded to the Trustee, after the receipt of such notice and request, to proceed and exercise the powers hereinbefore granted or to institute such action, suit or proceeding in the Trustee's own name), and without also having offered to the Trustee security and indemnity satisfactory to it against the costs, expenses and liabilities to be by the Trustee incurred therein or thereby; and such notice, request and offer of indemnity may be required by the Trustee as a condition precedent to the execution of the powers and trusts of this Indenture, or to the institution of any action in equity for the foreclosure hereof, for the appointment of a receiver, or for any other remedy hereunder, or otherwise, in case of such default as aforesaid in payment of the principal of any of said bonds, in the payment of any semi-annual installment of the interest thereon, or any other default by the Company, its successors or assigns, or failure to perform any of the covenants or stipulations hereof, to be kept and performed on its part.

"And it is also agreed that no holder or holders of any of the said bonds, or any of the said interest coupons intended to be hereby secured, shall institute any suit, action or proceeding in equity for the foreclosure hereof, or for the appointment of a receiver, or any action either at law or in equity for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided."

ing the execution of the bonds and their maintenance according to their terms, alleged that plaintiff is not entitled to maintain this action against it for the reasons, inter alia, below set

1. That

"Each of the bonds described in the statement of claim specifies on its face that it is one of a series of bonds by a first mortgage or deed of trust of even date with said bonds, duly authenticated, acknowledged and delivered, containing the terms and conditions of the loan to be made by said bonds, and that the same may hereafter be acquired by said mortgagee, lessor and assignee in interest, each County, Illinois. Each of said bonds also contains, inter alia, the following:

"Notwithstanding is hereby expressly made to each Trustee for a particular description of the terms and conditions of the loan to be made by said bonds, and for a description of the terms and conditions of the loan to be made by said bonds, and the rights of the mortgagee, lessor and assignee in interest, each County, Illinois, shall be as follows:

"It is hereby declared and agreed as a condition, that each and every mortgagee, lessor or assignee in interest, each County, Illinois, shall be bound to pay to the Trustee for a particular description of the terms and conditions of the loan to be made by said bonds, and for a description of the terms and conditions of the loan to be made by said bonds, and the rights of the mortgagee, lessor and assignee in interest, each County, Illinois, shall be as follows:

"It is hereby declared and agreed as a condition, that each and every mortgagee, lessor or assignee in interest, each County, Illinois, shall be bound to pay to the Trustee for a particular description of the terms and conditions of the loan to be made by said bonds, and for a description of the terms and conditions of the loan to be made by said bonds, and the rights of the mortgagee, lessor and assignee in interest, each County, Illinois, shall be as follows:

"It is hereby declared and agreed as a condition, that each and every mortgagee, lessor or assignee in interest, each County, Illinois, shall be bound to pay to the Trustee for a particular description of the terms and conditions of the loan to be made by said bonds, and for a description of the terms and conditions of the loan to be made by said bonds, and the rights of the mortgagee, lessor and assignee in interest, each County, Illinois, shall be as follows:

"Plaintiff had due notice of the terms and conditions of said trust deed and of the terms and conditions under which the said bonds were issued, and was not and is not a bona fide purchaser of said bonds before maturity and without notice of the conditions, limitations and defenses above set forth.

"The said provisions constituted and constitute conditions precedent. Unless said conditions and each of them were and are performed and satisfied, plaintiff had and has no legal right to maintain his said suit against the said defendant."

Defendant contends that by the express provisions of the bonds and the conditions in the trust deed to which they make reference, the plaintiff, who did not comply with those conditions, is barred from maintaining this action; that plaintiff is bound in particular by the condition that no bondholder shall sue at law on the bonds unless the holder of at least 1/5 of the amount of the bonds outstanding shall first have made demand upon the trustee that it take action; and that the reference in the bonds to the trust deed is sufficiently explicit to incorporate into them its terms, at least to the extent that plaintiff was put on notice of that provision of the trust deed which limited his right to bring this suit.

The questions are presented for our consideration on this appeal in determining the sufficiency of defendant's amended statement of defense. 1. Assuming that the bonds in question contain adequate and clear reference to all of the restrictions contained in the trust deed, is there any limitation in any provision of the trust deed of plaintiff's right to maintain this action at law? 2. Has plaintiff a right to sue at law for the recovery of the amount of these bonds or is he relegated to the provisions of the alleged "no action clause" in the trust deed?

Although a careful examination of all of the provisions of the trust deed leaves us in serious doubt as to whether it contains any limitation, even by implication, of plaintiff's right to sue at law on his bonds, we deem it unnecessary to decide

the first question inasmuch as our determination of the second question will be conclusive of the issues presented.

In the recent case of Oswianza v. Wengler & Mandell, 358 Ill. 302, the trust deed under which the bonds were issued contained the following provisions:

"Every holder of any of the bonds hereby secured (including pledgee) accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, upon or under this indenture, is vested exclusively in the trustee, and under no circumstances shall the holder of any bond or coupon or any number or combination of such holders, have any right to institute any action at law upon any bond or bonds or any coupon or coupons or otherwise, or any suit or proceeding in equity or otherwise, except in case of refusal on the part of the trustee to perform any duty imposed upon it by this indenture after request in writing by the holder or holders of at least twenty-five per cent (25%), in amount, of said bonds as aforesaid, and such refusal of the trustee shall continue for sixty (60) days after such demand as aforesaid. No action at law or in equity shall be brought by or on behalf of the holder or holders of any bonds or coupons, whether or not the same be past due, except by the trustee or by the requisite number of bondholders acting in concert under the provisions of this section for the benefit of all bondholders. In the event that pursuant to the terms hereof holders of at least twenty-five per cent (25%) or more, in amount, of said bonds shall have joined in exercising the right to act in lieu of the trustee, then none of the remaining bondholders shall have any right to institute any legal proceedings of the same or a similar character for the same default of the mortgagor."

The recitals contained in the bond in that case upon which the defendant/^{there} relied as adequately incorporating into the bonds by reference the above provisions of the trust deed containing the so-called "no action clause" are as follows:

"Said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract. * * * Both principal and interest bear interest after maturity thereof at the rate of seven per cent (7%) per annum and are payable in the manner described in the trust deed * * *. For a description of the mortgaged property and the nature and extent of the security reference is made to said trust deed, to all of the provisions of which this bond and each coupon hereto attached are subject, with the same effect as if said trust deed were herein fully set forth."

This court in deciding a question similar to that presented here in the recent case of Cummings v. Michigan-Lake Building Corp., 277 Ill. App. 470, quoted from the Oswianza

the first question answered as our examination of the record
question will be conclusive of the issues presented.
In the recent case of Decker v. Decker, 111 Ill.
1913, 221, the court said that the same rule should
govern the following questions:

"Every holder of any of the bonds hereby secured
(including the bonds) is entitled to the same
benefits and advantages that every holder of bonds
is entitled to in law or in equity, and under the same
conditions and circumstances, and under no circumstances
shall the holder of any bond or coupon or any number or
numbers of such bonds, have any right to institute any
action or law upon any bond or coupon or any coupon or coupon
or certificate, or any part or proceeds in whole or in part,
except in case of refusal on the part of the trustee to perform
any duty imposed upon it by this indenture after request in
writing to the trustee or holders of at least twenty-five per
cent (25%) of said bonds or coupons, and such
refusal of the trustee shall constitute for every holder of
such bonds or coupons a refusal. No action at law or in equity shall
be brought by or on behalf of the holder or holders of any bonds
or coupons, whether or not the same be paid due, except by the
trustee or by the holders of bonds or coupons acting in
concert with the trustee of this section for the benefit of
all bondholders. In the event that payment to the bondholders
of at least twenty-five per cent (25%) of said bonds, in whole
or in part, shall have been refused, then none of the remaining bondholders
in time of the refusal, then none of the remaining bondholders
shall have any right to institute any legal proceedings of the
kind or a similar character for the recovery of the principal."

For reasons stated in the bond in that case upon
which the defendant relies as an invalid consideration into the
bond by reference the above provisions of the trust deed con-
taining the so-called "no action clause" are as follows:

"This trust deed and this bond, as well as all the
other bonds hereunder, are to be taken and considered together
as parts of one and the same contract. * * * Each bondholder
and interest hereon shall after maturity thereof be the rate
of seven per cent (7%) per annum and the same in the amount
of interest is the same as the interest of the
trustee's property and the same and interest of the trustee's
property is to be paid to all of the bondholders and interest
of which this bond and each coupon shall be attached and
all the same shall be paid to all bondholders and interest
of which."

This court in deciding a question similar to that
presented here in the recent case of Decker v. Decker, 111 Ill.
1913, 221, cited from the Decker case.

case, the following: (Pages 475 and 476.)

"It follows that if there be read into the bonds in this case the no-action provisions of the trust deed it must be by an appropriate reference found in the bond. * * * This case resolves itself into the question whether there is in the bond language which may reasonably be said to incorporate therein, by reference, the no-action clause of the trust deed. * * * The language is so phrased and arranged as to strongly indicate that the obligor was speaking solely of the security. The purchaser of these bonds would not be impressed with any other thought. It would not occur to him, from this language, that in case the bonds were defaulted on maturity, as is true here, he might be unable to collect because of some provision in the trust deed limiting his power to sue at law. Enforcement against the security and a suit at law are matters of radically different import, and to destroy the right to sue at law, a provision of such character in the trust deed must be included in the bond, expressly or by clear reference thereto. Sturgis Nat. Bank v. Harris Trust and Savings Bank, ~~xxxx~~ (351 Ill. 465); Knock v. Brandon, 249 N. Y. 263, 164 N. E. 45. * * * The importance of bonds of this character as commercial paper requires that limitation on the right to sue, appearing in another instrument, be so clearly referred to in the bond that the purchaser of the bond will not be deceived but will be notified that he is to look further to know his rights as a bondholder. If a principle of public policy be invoked, it is quite important that in the traffic of bonds the prospective purchaser thereof know from the bond what search of the trust deed or mortgage is necessary in order to learn his rights. * * * If the common law rights of the holder are to be limited it must be done by appropriate reference in the bond to the provisions of the trust deed or mortgage, that he may have warning that his right to sue in case of default is limited by something not appearing in the bond itself."

The provision of the bonds in the case at bar that defendant relies upon as containing a sufficiently clear reference to what it claims is the "no-action clause" of the trust deed herein or such reference "as will reasonably put the bond purchaser on notice that he must consult the trust deed in order to ascertain his rights" is as follows:

"Reference is hereby expressly made to said trust deed for a particular description of the terms and conditions thereof on which said bonds are issued and secured; and for a description of the nature and extent of the security therefor; and the rights of the bondholders with regard to such security.

"This bond may become due and payable in case of default in accordance with the provisions of said trust deed."

Defendant insists that the word "issued" in the manner in which it is used in the phraseology of the above provision renders the reference contained in the bonds here to the terms

[illegible]

The execution of the bonds in the name of the State

to find it again in the "no-action clause" of the trust deed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

It is noted in the Government of the District of Columbia that the word "District" is used in the Government of the District of Columbia to refer to the District of Columbia and not to the District of Columbia.

and conditions of the trust deed, adequate and sufficient to restrict plaintiff's right to his action at law.

We are unable to agree with this contention and are of the opinion that the reasoning of the court in the Oswianza case, as applied to the reference provision of the bond there, is peculiarly applicable to the reference provision of the bond here. The word "issued" is coupled with the word secured and in the brief compass of three printed lines on the bonds, containing the above recital, the words "secured" or "security" occur three times.

In Enoch v. Brandon, 249 N. Y. 263, the recital in the bonds referring to the trust mortgage also used the language "the terms and conditions under which said bonds are issued and secured" and was as follows:

"* * * to which reference is hereby made for a description of the property mortgaged and pledged, the nature and extent of the security, the rights of the holders of the bonds with respect thereto, the manner in which notice may be given to such holders, and the terms and conditions under which said bonds are issued and secured." (Italics ours.)

There the court said in construing this recital at pages 268 and 269:

"The provisions all have to do with the trust mortgage. They refer to the rights conferred by it upon the bondholder and limit and explain those rights. They are so linked together as to indicate that the obligor was speaking solely of the security. A purchaser scanning the bonds would have the same thought. It would never occur to him that when November 1, 1941, arrived, because of something contained in the mortgage he might be unable to collect the amount due him. He would interpret the statement that the bonds were secured by and entitled to the benefits and subject to the provisions of the mortgage, as meaning that a foreclosure or other relief might be had thereunder only subject to its provisions. He would see that reference to it is also made to determine the terms and conditions under which the bonds are issued and secured. Again it would mean to him as it means to us, that only by turning to the mortgage might he discover the precise nature of the lien he is to obtain. He would see that the bonds were to be issued not only upon the general credit of the corporation, but upon the faith of some collateral mortgage. To it he must go if further knowledge as to this security is desired."

The opinion in the Oswianza case was filed before

of twelve men chosen, each sent off in pairs to

and the nation and as such a 'national' subject

It is possible to agree with this conclusion and

It is the opinion of the court in the instant case that the testimony of the witness is not sufficient to establish the existence of the bond.

is hereby notified that the following is the result of the examination of the above-mentioned documents:

The following have sold their business at "Barnes" show sale.

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Attaining the above results, the author "assumes" as "necessary"

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THE HOUSE OF COMMONS

Journal of the American Medical Association

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As to the court held in constructing this record as pages 258

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1. The provisions all have to do with the trust mortgage.
2. They refer to the title conveyed by it upon the condition of
3. title and explain those terms. They are no title insurance
4. policy. The title is insured by the title insurance company.
5. The title insurance company is the party which is to insure the
6. title. It is the party which is to insure the title.
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defendant filed its reply brief in this cause and defendant's counsel earnestly urge that the cases of Ledgerwood v. Hale & Kilburne, 47 Fed.(2d) 318, Crosthwaite v. Moline Plow Co., 298 Fed. 466, and Oster v. Building Development Co., 252 N. W. (Wis.) 168, which the Supreme Court, in the Oswianza case, distinguished on the facts of each as containing sufficient and adequate language on the notes or bonds therein, to incorporate by reference limitations in the respective trust deeds or agreements on the right of individual noteholders or bondholders to bring an action at law to recover, uphold their contention that the reference in the bonds in the instant case was also sufficient and adequate for the same purpose. We are unable to agree with counsels' contention.

It is also urged that, inasmuch as the amended statement of defense averred that plaintiff was not a purchaser of the bonds in due course before maturity without notice of the limitations set out in the bonds and trust deed, a sufficient defense was stated and that the statement of defense was therefore erroneously stricken by the trial court.

In connection with its major contention that plaintiff's right to sue at law on his bonds was restricted by the alleged "no action clause" of the trust deed, the defendant strenuously insisted that negotiability of the bonds was not the test as to plaintiff's right to bring this action at law. In the instant contention it advances rules governing negotiable instruments in support of this alleged defense.

The questions arising in this case are primarily questions of contract, and, regardless of the question of the negotiability of these bonds, the real question here is whether the bonds by their terms are subject to any provisions of the

defendant filed its reply brief in this case and defendant's counsel earnestly urge that the cases of Ladner v. Main A. Lumber Co., 27 Cal. (2d) 318, 138 P.2d 338, 138 P.2d 339, 200 Cal. 488, and Ortiz v. Pacific Development Co., 222 P.2d 1000, 1001, 1002, which the Supreme Court, in the Ladner case, distinguished on the facts of each as containing different and

adverse language on the point at issue therein, be incorporated by reference limitations in the respective trust deeds on grounds on the right of individual noteholders or bondholders to bring an action at law to recover, uphold their contention that the reference in the bonds in the instant case was also sufficient and adequate for the same purpose; we are unable to agree with counsel's contention.

It is also urged that, inasmuch as the amended statement of defense asserted that plaintiff was not a noteholder of the bonds in the county before maturity without notice of the latter's sale set out in the bonds and trust deed, a sufficient defense was stated and that the statement of defense was therefore

extensively availed by the trial court. In support of this claim defense

the court stated in this case was preliminary question of contract, and, regardless of the question of the negotiability of these bonds, the real question here is whether the bonds by their terms are subject to any provisions of the

trust deed affecting plaintiff's right to sue at law. We find no merit in defendant's last contention and hold that its statement of defense was properly stricken by the trial court.

Our decision is controlled by the Oswianza case, inasmuch as the reference in the bonds here is limited to the description, nature and extent of the security as it was in that case, where the court concluded that "to hold that a provision of the trust deed limiting the right to sue at law was thus included by reference is to bind the bondholder by a stipulation of the trust deed, of which the bond gave him no warning or notice."

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

There have been various attempts to show that the
the words in defendant's last declaration and hold that the
point of defense was properly attacked by the trial court.

The motion is controlled by the Ballinger case.
Inasmuch as the reference in the bonds here is limited to the
description, nature and extent of the security as it was in
that case, where the court concluded that "it was that a
provision of the trust deed limiting the right to sue at law
was then included by reference is to bind the bondholder by
a stipulation of the trust deed, of which the bond gave him
no warning or notice."

For the reasons indicated herein the judgment of
the trial court is affirmed.

IT IS ORDERED.

Very truly yours,
J. L. ...

37349

247

FRANK A. AOSKAD,
Appellant,

v.

CARL THORGHENSEN and
HANS CHEL. WILCKSEN,
Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

279 I.A. C204

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an assumpsit action brought February 11, 1932, by Frank A. Aoskad, plaintiff, upon four bonds of \$1,000 each and certain interest coupons attached thereto, all dated January 15, 1925, executed by defendants and payable to the bearer or his order January 15, 1932. The case was tried by the court without a jury, the issues found against plaintiff and judgment entered against him for costs March 6, 1934.

The pertinent paragraphs of defendants' last amended affidavit of merits are:

"That the 340 negotiable instruments referred to in the statement of claim are upon their face, and the face of each of them, stated to be secured by a certain deed of trust which was filed for record in the office of the Recorder of Deeds of Cook County, Illinois, as Document Number 3742468, and which became, by reference a part and portion of each of said bonds; and that said deed of trust contains the following provision, to wit:

"ARTICLE FIVE, Sec. 11. No holder of any bond or coupon secured hereby shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder shall previously have given to the trustee written notice of such default and of the continuance thereof as hereinbefore provided nor unless, also the holders of one-fifth (1/5) in principal amount of the bonds issued hereunder, then outstanding, shall have made written request to the trustee and shall have offered to him a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceeding in his own name, and the Trustee shall have refused or unreasonably delayed to comply with such request, nor unless, also, they or some one or more of the holders of said bonds shall have offered to the trustee security and indemnity to the satisfaction of the trustee, against the costs, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity

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THANK YOU FOR YOUR SERVICE

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THE UNIVERSITY OF CHICAGO
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2. *Conclusions* and *Recommendations*

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Referring to the "Statement of the Government of the United States of America"

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are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts of this indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure, or for the appointment of a receiver, or for any other remedy hereunder, it being understood and intended that no one or more holders of bonds and coupons shall have any right, in any manner whatever, by his or their action to affect, disturb or prejudice the lien of this indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons.'

"* * *

"Section 13. All rights of action under this indenture, or under any of the bonds or coupons, may be enforced by the trustee without the possession of any of the bonds or coupons, and any suit or proceedings instituted by the trustee shall be brought in his name, as trustee, and any recovery of judgment shall be for the benefit of the holders and registered owners of said bonds and coupons.'

"And these defendants aver that pursuant to the rights, powers and authority granted to said trustee in said trust deed, the said Oscar H. Haugan, as trustee, did on the 28th day of August, A. D. 1931, file and exhibit his bill of complaint in the Circuit Court of Cook County, Illinois, in the cause entitled 'Oscar H. Haugan, as trustee, vs. Carl Thorgersen, et al.,' case No. B-226927, wherein said Oscar H. Haugan prayed for the foreclosure of all the unpaid and outstanding bonds secured by said deed of trust, including the instruments sued on by the plaintiff herein, and all other bonds of said issue, and these defendants aver that such proceedings were had and taken in said cause that said Circuit Court of Cook County, Illinois, did on to-wit: the 31st day of January, A. D. 1934, enter a final decree wherein the Court found that there was due, owing and unpaid to Oscar H. Haugan, as trustee, for the use of the holders and owners of all the bonds of said issue, including the plaintiff herein, with respect to the instruments sued on, the sum of \$239,811.63, and directed the sale of said premises for the satisfaction of said debt and costs, with a provision in said decree for a deficiency decree against these defendants for the amount of any deficiency remaining upon such sale, which decree still stands in full force and effect, unreversed and unimpaired, and that by virtue of said proceedings taken by said trustee on behalf of the plaintiff, the entire claim and demand of the plaintiff on the instruments sued on herein, and all liability of the defendants therein, became merged in and fixed by said decree afore-described, and the alleged right of action sued upon has become barred by said former recovery."

The case was tried upon the following stipulation of

facts:

"1. That the plaintiff, Frank A. Aeskad, was on and prior to the 11th day of February, A. D. 1932, the owner and holder of four certain instruments commonly known as mortgage bonds, made, executed and delivered by the defendants, Carl Thorgersen and Hans Chr. Bricksen, all dated the 15th day of January, A. D. 1925, and bearing numbers 274, 285, 305 and 313, together with unpaid interest coupons thereon, each of said

the parties hereto, in every way, as the policy of the law, is to be construed in favor of the protection of the public and private interests for the benefit of the community, and to any action or cause of action for recovery, or for the enforcement of a contract, or for any other remedy hereunder, it being understood and intended that no one or more parties of said bonds and coupons shall be liable, in any manner whatsoever, by his or their action to effect, directly or indirectly, the lien of this instrument, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner provided, and for the benefit of all holders of such outstanding bonds and coupons.

Section 12. All rights of action under this instrument, or under any of the bonds or coupons, may be enforced by the trustee without the possession of any of the bonds or coupons, and any suit or proceeding instituted by the trustee shall be deemed to be for the benefit of the holders and registered owners of said bonds and coupons.

And there defendants aver that pursuant to the rights, powers and authority granted to said trustee in said trust deed, the said trustee, J. H. Morgan, as trustee, did on the 20th day of July, 1911, file and exhibit his bill of complaint in the Circuit Court of Cook County, Illinois, in the cause entitled "J. H. Morgan, as trustee, vs. Carl Thorgerson, et al.", case No. 10,547, wherein said J. H. Morgan sought for the recovery of all the principal and outstanding coupons owned by said Carl Thorgerson, including the said bonds and coupons, and all other bonds or said issue, and these defendants aver that such proceedings were had and taken in said court and the said bill of complaint was filed, and a final decree entered in said court, to-wit:

And defendants aver that there was due, owing and unpaid to Oscar H. Morgan, as trustee, for the use of the holders and owners of all the bonds of said issue, including the plaintiff herein, \$11,111.33, and that the instrument was on the sum of \$11,111.33, and that the sale of said premises for the satisfaction of said debt was made, with a provision for the payment of said debt and costs, for the amount of any deficiency between said debt and such sale, which between said parties in said court was tried, determined and adjudged, and that by virtue of said proceedings taken by said trustee on behalf of the plaintiff, the entire claim and demand of the plaintiff on the instrument was satisfied, and all liability of the defendant Thorgerson was satisfied by said sale.

And the alleged right of action such upon them became barred by said former recovery.

The case was tried upon the following stipulation of facts:

That the plaintiff, Frank A. Asak, was on and prior to the 15th day of February, A. D. 1907, the owner and holder of four certain instruments commonly known as mortgage bonds, made, executed and delivered by the defendant, Carl Thorgerson, and that said bonds, all dated the 15th day of February, A. D. 1907, and bearing numbers 274, 283, 288 and 218, were secured with said mortgage bonds, each of said

bonds being in the principal sum of \$1,000 and each of said interest coupons being in the sum of \$30; that subsequent to the filing of the suit herein there was paid on account of said bonds and interest coupons the sum of \$1,500, without prejudice to any of the rights of the defendants, or either of them, to contest said proceedings or to interpose any defense that might be available to them or either of them; that a true, accurate and correct copy of one of said bonds is attached to and forms a part of the second amended statement of claim filed herein, that none of said bonds was registered, that each of said bonds became due and payable by its terms on January 15, 1932, and that plaintiff purchased said bonds from State Bank of Chicago.

"2. That the terms, provisions and conditions set forth in each of said bonds shall form a part of this stipulation, and that the bonds sued on are part of a series of 340 bonds secured by a trust deed filed in the office of the recorder of deeds of Cook County, Illinois, as Document No. 3742462.

"3. That on the 28th day of August, A. D. 1931, Oscar H. Haugan, the trustee designated in the trust deed securing said bonds, filed and exhibited his bill of complaint in the Circuit Court of Cook County, Illinois, in a certain cause entitled Oscar H. Haugan, as trustee v. Carl Thorgersen, et al., and bearing No. B-226927, wherein said Oscar H. Haugan prayed for the foreclosure of all the unpaid and outstanding bonds secured by said deed of trust, including the instruments sued on by the plaintiff herein, and all other bonds of said issue, and that such proceedings were had and taken in said cause that on the 31st day of January, A. D. 1934, a final decree was entered therein, a true, accurate and correct copy whereof is annexed hereto and forms a part hereof, together with a true, accurate and correct copy of said deed of trust.

"4. That if it should be determined by the Court that the plaintiff is entitled to recover herein, then in order to avoid the necessity of accounting or computation, it is agreed that the amount of the finding in favor of the plaintiff and against the defendants is the sum of \$3,205, together with interest thereon at the statutory rate from March 6, 1934."

Plaintiff's theory is that, since the bonds in question contain an unconditional promise to pay, such reference as appears in them to the trust deed securing the bonds applies only to such security and in no wise restricts his common law right of action to recover on same; that any action taken by the trustee under and pursuant to the trust deed cannot affect his bonds or his right to recover in the instant action; and that, under the facts and the law, the lower court should have found for him with judgment for "\$3,205, together with interest thereon at the statutory rate from March 6, 1934," pursuant to the stipulation of the parties.

Defendants contend (1) that the terms and covenants

of the trust deed securing the bonds sued upon are incorporated in the bonds by reference, and that the holder of such bonds took them subject to the terms, conditions and covenants of the trust deed; (2) that the foreclosure decree entered January 31, 1934, in the Circuit court adjudicated the rights of the bondholders and is binding upon plaintiff, even though he was not a party to the proceeding in which it was entered; and (3) that the entry of the decree merged the debt or bonds secured by the trust deed in the judgment and precluded any and all holders of the bonds secured by the trust deed in question from proceeding to enforce obligations, rights or liabilities growing out of such bonds except pursuant to the terms of the decree.

As to defendants first contention it is sufficient to state there is nothing in the trust deed that expressly forbids individual holders of bonds to bring actions at law thereon. The only restrictive provisions in the trust deed limiting an individual bondholder's right to proceed to enforce payment of his bonds in case of default are those heretofore set forth in defendants' affidavit of merits. Examination of those provisions demonstrates that such terms, conditions and limitations as are therein imposed apply only to proceedings brought under the trust deed itself.

We are clearly of the opinion that, under the facts in the instant case, the ~~only~~ purpose of the restrictions contained in sections 11 and 13 of Article V of the trust deed was to limit individual action only in the institution of foreclosure proceedings or other actions at law or in equity under the trust deed, and not in the commencement of an action to recover upon the personal obligation of defendants, and that plaintiff had the right to sue the mortgagors for a judgment

on their personal obligations. (Schatskia v. Rosenwald & Weil, 267 Ill. App. 169.)

If we assume that the quoted provisions of the trust deed are such as to limit the right of the bondholder to sue at law, are they incorporated into the bonds expressly or by such clear reference as to bar plaintiff's right to maintain this action?

The only provisions of the bonds in the instant case, from which it might be argued that a limitation in the trust deed of plaintiff's right to sue at law is included by reference in the bonds, are as follows:

"This Bond is one of a series of three hundred forty (340) bonds, numbered consecutively from one (1) to three hundred forty (340), both numbers included, all of like tenor and effect, except as to respective amounts, numbers and maturities thereof, aggregating the principal sum of Two Hundred sixty-five Thousand Dollars (\$265,000.00)," (here follows numbers, amounts and maturities), "the payment whereof, with interest thereon is equally and ratably secured by a Deed of Trust in the nature of a real estate mortgage, duly executed, acknowledged and delivered by the Mortgagors, mortgaging, transferring and conveying unto Oscar H. Hangan, Trustee, of Cook County, Illinois, certain real estate located in the City of Chicago, in the County of Cook and State of Illinois, reference being hereby made to said Deed of Trust for the number and description of the premises conveyed and mortgaged, the nature and extent of the security thereby created, the nature of the rights of the holders of said bonds and of the Trustee in respect of such security." (*Italics ours.*)

Even if the trust deed does contain a so-called "no-action clause," it is readily apparent that the above italicized language in the bond contains no adequate reference thereto, but simply constituted a reference to the description, nature and extent of the security and the rights of bondholders thereunder. The description of the property and the security constitute the subject matter of the clause, and to hold that a provision of a trust deed limiting the right to sue at law was thus included by reference is to bind the bondholder by a stipulation of the trust deed, of which the bond gave him no warning or notice.

(Cowianza v. Bengler & Mandell, 358 Ill. 302.)

Defendants' second contention that plaintiff's rights as the holder of the bonds in question were adjudicated by a decree of foreclosure entered in the Circuit court January 31, 1934, in a proceeding brought by the trustee to foreclose the trust deed executed by defendants to secure all of the bonds of the issue, even though he was not a party to that cause, we find to be without merit.

It has been held that the owner of a note secured by a trust deed may sue the maker of the note in assumpsit for a judgment upon the personal obligation; that he may sue in equity for the foreclosure of the trust deed; or that he may recover possession of the property conveyed by the trust^{deed}/by an action of ejectment. These remedies are concurrent or successive, as the owner of the note or trust deed may deem proper, and he may pursue any two or all three of these remedies simultaneously. ^{Ill.}
(Lindheimer v. Supreme Liberty Life Ins. Co., 263/App. 524, and cases cited therein.)

This we believe to be the correct rule where the note or notes or bonds evidencing the debt secured by the trust deed are held or owned by one individual. The reason for this rule is obvious, but it can have no application here.

We think that it is the recognized rule that where an individual holder of a bond or bonds (a part only) of a series of bonds secured by a trust deed does obtain judgment at law upon such bond or bonds, no levy may be had thereunder upon the property covered by that trust deed.

It must be conceded that in the absence of provisions of the trust deed limiting his right to maintain an action at law, the individual holder of a bond or bonds of a series secured by a trust deed may abandon and waive his right to apply to the

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security and sue at law in a personal action. (Oswianska v. Bengler & Mandell, supra.) Having abandoned and waived his right to any claim on the property secured, how can it be said that plaintiff's rights were adjudicated in the foreclosure proceeding, in which he had absolutely no interest and to which he was not a party under the doctrine of class representation or any other doctrine?

We find defendants' third contention to be equally without merit. They urge that the entry of the decree of foreclosure in the Circuit court merged plaintiff's bonds, as well as all the other bonds secured by defendants' trust deed in that decree, and precluded plaintiff from proceeding to enforce payment of his bonds in any manner except pursuant to the terms of the decree. The fallacy of this contention is obvious. It assumes that plaintiff still claimed for his bonds the benefit of the security of the trust deed which he had abandoned and waived when the instant action at law was instituted to obtain a personal judgment on them, which the trial court erroneously failed and refused to enter.

Defendants cite many cases upon the doctrine of merger to the effect that by a judgment at law or a decree in chancery the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. We are in full accord with the rule as enunciated in the cases cited, but fail to see where it has any application to the question involved here. The foreclosure proceeding was not based on plaintiff's bonds. The trust deed no longer afforded them any protection or security and the decree could give no relief to their owner. It is insisted that to permit a judgment to be entered in this action

...and was at law in a personal action. (Exhibit 7.)
 ...having abandoned and waived his
 right to any claim on the property involved, how can it be said
 that plaintiff's rights were adjudicated in the proceedings
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 he was not a party under the doctrine of abate representation
 or any other doctrine?

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 the terms of the decree. The fallacy of this contention is
 obvious. It assumes that plaintiff still retained his bonds
 the benefit of the security of the trust deed which he had
 abandoned and waived when the instant action at law was instituted
 to obtain a personal judgment on them, which the trial court
 erroneously failed and refused to enter.

Defendants also urge that when the decree in chambers
 to the effect that by a judgment at law or a decree in chambers
 the contract or instrument upon which the proceeding is based
 becomes conclusively merged in the judgment. We are in full accord
 with the rule as enunciated in the cases cited, but fail to see
 where it has any application to the question involved here. The
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 and the decree could give no relief to their owner. It is
 insisted that to permit a judgment to be entered in this action

would be permitting two judgments to be entered against the defendants upon the same obligation in courts of concurrent jurisdiction. The bonds enjoying the security of the trust deed have been decreased to the extent of plaintiff's bonds, and the foreclosure decree of the Circuit court could not possibly, under the law, have included them as obligations within its purview. As we view the matter the judgment entered by us in this cause is and can be the only judgment entered against defendants on their obligation arising from plaintiff's bonds.

The judgment of the Municipal court in this cause must be reversed, and, as the sole defense to the action was that plaintiff had no right to bring an action at law against defendants, judgment will be entered here in favor of plaintiff and against defendants for \$3,351.85, which includes \$3,205 principal and \$146.85 interest.

JUDGMENT REVERSED AND JUDGMENT
ENTERED HERE IN FAVOR OF PLAINTIFF
AND AGAINST DEFENDANTS FOR \$3,351.85.

Gridley, P. J., and Scanlan, J., concur.

could be prevailing law judgments to be revised against the
statute upon the same principle in regard to amendment
jurisdiction. The point regarding the nature of the law
that have been referred to the extent of jurisdiction's scope,
and the jurisdiction's scope at the time of the law's
enactment, under the law, have included them as obligations
within the law. As we view the matter the judgment
entered by us in this case is and can be the only judgment
entirely correct and binding as their obligation under law
jurisdiction's scope.

The judgment of the majority court in this case
must be reversed, and, as the sole basis of the action was
that plaintiff was so right as being an action as law against
defendant, judgment will be entered here in favor of plaintiff
and against defendant for \$2,000.00, plus interest at 6%
per annum and costs as follows.

REVEREND FATHER JOHN J. O'NEILL
JUDGE OF THE COURT OF COMMON PLEAS
CITY OF PHILADELPHIA
AND CLERK OF THE COURT OF COMMON PLEAS

Witness my hand and seal this 1st day of June, 1900.

25 7

37560

G. L. NORUK, as successor
trustee, etc.,
Appellee,

v.

MICHAEL OLYNIEC et al.,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

279 I.A. 620⁵

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

October 5, 1932, G. L. Noruk, as successor trustee, (hereinafter referred to as plaintiff) filed a bill to foreclose a first mortgage trust deed executed April 10, 1928, by defendants Michael Olyniec and Veronica Olyniec, his wife, to secure payment of bonds issued by them aggregating \$60,000, \$7,500 of which had been paid and cancelled prior to defendants' default. March 19, 1934, a decree of foreclosure and sale predicated upon this bill was entered, which this appeal seeks to reverse.

Plaintiff's bill alleged inter alia that subsequent to the execution of the first mortgage trust deed the Olyniecs (hereinafter referred to as defendants) executed a second mortgage trust deed (recorded May 2, 1932), without consideration, to one Fleming to secure payment of a purported indebtedness of \$10,000, merely for the purpose of hindering and delaying enforcement of the lien of the first trust deed; and that the records of the office of the clerk of the Circuit court disclosed that there had been filed April 30, 1932, a purported claim for mechanic's lien against the premises involved by one Stanley Olyniec, a brother of defendant Michael Olyniec, which was fictitious and fraudulent and filed only for the purpose of encumbering the

07580

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, ss.
I, the undersigned, Clerk of said Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files and records of said Court.

WITNESSED my hand and the seal of said Court at New York, New York, this 1st day of May, 1934.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, ss.
I, the undersigned, Clerk of said Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files and records of said Court.

WITNESSED my hand and the seal of said Court at New York, New York, this 1st day of May, 1934.

On or about May 1, 1934, the undersigned, Clerk of said Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files and records of said Court.

On or about May 1, 1934, the undersigned, Clerk of said Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files and records of said Court.

premises and hindering and delaying the enforcement of the lien of said first trust deed. Defendants in their answer do not deny these allegations. Fleming and Stanley Olyniec, also made parties defendant and served with summons in this cause, failed to appear and were defaulted. Prior to the filing of the bill in the instant case Fleming, the trustee under the second mortgage trust deed, filed a bill in the Circuit court to foreclose that trust deed and requested and secured the appointment of a receiver, who took possession of the premises theretofore conveyed by the respective trust deeds and proceeded to collect the rents.

Upon learning of the appointment of such receiver, plaintiff, upon leave granted, filed a petition in the second mortgage foreclosure proceeding in the Circuit court in support of his motion that the receiver be discharged. This motion was denied and he perfected an appeal to this court seeking to reverse the order denying same.

It appeared upon the hearing before the master to whom this cause was referred, that defendants, the owners of the equity in the property involved herein, consulted attorney John J. Coburn of the law firm of Coburn, Kearney & Coburn, concerning their interests in this litigation; that Mr. Coburn thereupon entered into negotiations which culminated December 31, 1932, in the execution by him, representing the Olyniecs, and by the solicitor for plaintiff, of what purported to be a written "contract of accord and settlement." In substance this contract provided that, in consideration of the Olyniecs securing the dismissal of the second mortgage foreclosure proceeding, the discharge of the receiver therein and the release or satisfaction of all liens and judgments then standing against the property, and of their

promises and binding and defining the enforcement of the law
of said laws and laws. Defendants in their answer do not
deny these allegations. Plaintiff and jointly advised, also made
particular statement and answer with answer in this answer, failed
to appear and were dismissed. After to the filing of the bill
in the instant case, Plaintiff, the trustee under the second mortgage
first deed, filed a bill in the Circuit Court to foreclose that
trust deed and requested and secured the appointment of a receiver,
who took possession of the premises thereafter conveyed by the
respective first deeds and proceeded to collect the rents.
Upon learning of the appointment of such receiver,
Plaintiff, upon leave granted, filed a petition in the second
mortgage foreclosure proceeding in the Circuit Court in support
of his motion that the receiver be discharged. This motion was
granted and he petitioned an appeal to this court seeking to reverse
the order denying same.
It appeared upon the hearing before the master to whom
this cause was referred, that defendants, the owners of the equity
in the property involved herein, consulted attorney John T. Cochran
of the law firm of Cochran, Kennedy & Hester, concerning their
interest in this litigation; that Mr. Cochran thereafter advised
that mortgagee under said mortgage number 11, 12, 13, 14, 15, 16
conveyed by him, respectively the plaintiffs, and by the will of
for Plaintiff, of which property to be a certain "interest of
trust and settlement". In response that certain Plaintiff filed
in connection of the litigation involving the Plaintiff of the
second mortgage foreclosure proceeding, the discharge of the
receiver therein and the release of satisfaction of all liens
and judgments then existing against the property, and of their

delivery to the Cosmopolitan State Bank, as trustee, of a clear title to the premises free of all liens and encumbrances except the first mortgage, taxes and special assessments, plaintiff agreed to pay defendants \$1,500 and to release them from personal liability on any deficiency decree that might be entered in this proceeding to foreclose the first mortgage trust deed.

It also appeared that pursuant to the terms of the contract defendants procured the dismissal of the second mortgage foreclosure proceeding, the discharge of the receiver therein, and that plaintiff, as successor trustee under the first mortgage trust deed, took possession of the premises; that the mechanic's lien claim heretofore referred to was released; that all judgments which stood as liens against the property were either released or satisfied of record except the judgment of one Keitan, who agreed to accept in settlement and satisfaction of his judgment \$300 out of the \$1,500, which the Olynies were to receive for their equity, when same was paid to them; and that plaintiff repudiated the contract and refused to comply with its terms because some of the bondholders refused to ratify his action in executing it.

After overruling defendants' exceptions to the master's report, the court adopted the findings and recommendations of the master and entered a decree of foreclosure and sale, the portions of which, pertinent to this appeal, are as follows:

"TWENTY-NINTH: The court further finds that on December 31st, A. D. 1932, subsequent to the filing of the bill of complaint in this cause, the complainant herein, entered into a written agreement with MICHAEL OLYNIEG and VERONICA OLYNIEG, his wife, under which the said complainant undertook, in consideration of the said MICHAEL OLYNIEG and VERONICA OLYNIEG, his wife, executing a deed of their equity, in the property herein sought to be foreclosed, to the COSMOPOLITAN STATE BANK, as Trustee, conveying said premises free and clear of liens and encumbrances, except the first mortgage taxes and special assessments, to pay to the said MICHAEL OLYNIEG and VERONICA OLYNIEG, his wife, the sum of FIFTEEN HUNDRED DOLLARS (\$1500.00) within thirty (30) days; that under said agreement, the complainant undertook to release the said MICHAEL OLYNIEG

and VERONICA OLYNING, his wife, from any personal liability on a deficiency decree in this case; that the said complainant, in this proceeding, sues in a representative capacity as Successor Trustee under a certain Trust Deed executed by the said MICHAEL OLYNING and VERONICA OLYNING, his wife, which Trust Deed was introduced in evidence herein, and marked as an exhibit in this proceeding; that under the terms and provisions contained in said Trust Deed, the complainant herein, had no power to purchase title to said property and place same in the possession of another, nor did said complainant have power to agree to release said defendants from any personal liability.

"THIRTIETH: The court further finds that the defendants having been parties to said Trust Deed creating the trust herein, had notice of the limitation of the power of the Trustee thereunder, and that it has not been shown that the defendants were harmed because of the failure of the said complainant to carry out the written agreement entered into between them, or that they parted with any consideration in reliance thereon; that the defendants, MICHAEL OLYNING and VERONICA OLYNING, his wife, having had notice of the lack of power of the Trustee, it must have been contemplated by the parties that said agreement could not be affected as against the holders and owners of the bonds and interest coupons secured by said Trust Deed, until ratified by them; that the evidence shows that some of the bondholders refused to ratify said agreement, and therefore, the court finds that said agreement is void by reason of the lack of power of the said complainant to enter into such an agreement or to bind the holders and owners of said bonds and interest coupons as beneficiaries of said trust."

Defendants contend that the contract of "accord and settlement" was binding upon plaintiff and the bondholder beneficiaries of the trust deed herein, and that the court erred in not dismissing plaintiff's bill for want of equity; that the defendants were damaged by reason of their removal of the encumbrances and liens against the premises in compliance with the terms of the contract; and that plaintiff was estopped in equity from proceeding to a decree after entering into the contract of "accord and settlement."

Plaintiff's theory is that, even though the contract in question was binding upon the holders of the bonds secured by the first mortgage trust deed, it would not be a defense to this action, inasmuch as plaintiff's right to a decree of foreclosure and sale was recognized in the contract; that in his capacity as successor trustee he had no power under the terms of the trust deed foreclosed upon to bind the holders of the bonds secured

by the trust deed by the contract in question; and that he was not estopped from going ahead with the foreclosure proceedings.

The real question presented to us for determination is whether plaintiff, under the provisions of the trust deed in the instant case, could charge the trust estate by his executory contract or could compromise or yield any right already accrued to the owners of the bonds, which the trust deed was given to secure, without the consent or subsequent ratification of all the bondholders. That the power and authority of a trustee to deal with the security or trust estate is circumscribed by the provisions of the trust indenture is not open to question. The general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contracts unless authorized so to do by the terms of the instrument creating the trust. The trust estate cannot promise, and unless the trustee is bound no one is bound for he has no principal, and the rules which govern the relation of principal and agent are not applicable to trustees. (26 R. C. L., 1316, 1317; Riedall v. Stuart et al., 151 Okla. 266, 2 P. (2nd) 929.)

The Glynnes were originally defaulted for want of appearance, which default was vacated August 22, 1933, and leave granted them to answer. No cross bill was filed seeking affirmative relief against either the trustee or bondholders because of the contract or its breach by the trustee, and their answer simply contested the trustee's right to maintain this action, averring that he was estopped and precluded from so doing by reason of the contract and his failure to pay them \$1,500 and release them from "any personal liability on a deficiency decree in any foreclosure on the part of complainant" in accordance with the terms of the contract.

The trustee brings this action merely as a representative of all the bondholders and for their ^{benefit,} and we think that it is clear that he had no authority to enter into any contract which would deprive them of any of their rights. The release of the mortgagors from personal liability on their bonds surely constituted a deprivation of a substantial right of the bondholders.

But, even though we assume that the trustee's action in entering into the contract was binding upon the bondholders and that the contract was breached by him, was there anything in the contract that precluded plaintiff from proceeding to the foreclosure and sale of the property or that could possibly warrant a chancellor dismissing the bill in this cause for want of equity? It will be noted from the italicized language in that portion of the contract, last above quoted, that the parties contemplated that a decree of foreclosure and sale would be entered in this cause.

As to defendants' claim that plaintiff was estopped by reason of the contract from proceeding to a decree, it is sufficient to state that not only was he not estopped but that the contract by its terms anticipated the entry of a decree of foreclosure and sale.

There is not a scintilla of evidence in the master's report that defendants parted with anything under the contract or that they suffered any damage because of its breach. The facility with which they discharged or satisfied the second mortgage, the mechanic's lien claim and the judgments of record against the premises, all of which were made charges against the property conveyed as security by the first mortgage trust deed shortly before defendants' default on the bonds secured thereby, lends color to the allegations of the bill, which were not denied in the Olynices' answer, that all of these evidences of indebtedness, with the exception of one judgment, were fictitious and fraudulent and were created and lodged as liens

The first thing that comes to mind is a representation
of all the parties and the things and we think that is an effort
that he has no authority to enter into any contract which would
derogate them of any of their rights. The release of the mortgage
from the usual liability on their bonds merely constituted a
deposition of a substantial right of the beneficiaries.
But, even though we assume that the trustee's action in
entering into the contract was binding upon the beneficiaries and
that the contract was granted by him, we have nothing in the
contract that precluded plaintiff from proceeding to the foreclosure
and sale of the property to satisfy the mortgage without a declaration
dismissing the bill in this case for want of equity. It will be
noted from the affidavits made in this case that the mortgage
did not contain, that the parties contemplated that a notice of
foreclosure and sale would be given in this case.
as we understand, that plaintiff was estopped by
reason of the contract from proceeding to a foreclosure, it is not binding
on them that they had not accepted but that the contract by
the terms anticipated the entry of a decree of foreclosure and sale.
There is not a sentence of evidence in the master's report
that defendants parted with anything under the contract or that they
suffered any damage because of its breach. The liability with which
they discharged or satisfied the record mortgage, the mechanic's
lien claim and the judgment of record against the premises, all of
which were charges against the property conveyed as security
for the first mortgage, have been clearly satisfied, and the
on the bonds secured thereby funds to the satisfaction of the
all, which were included in the judgment, and all of
these evidences of indebtedness, with the exception of one judgment,
were satisfied and foreclosed and were ordered and lodged as liens

against the premises for no other purpose than to hinder and delay the enforcement of the lien of the first trust deed.

We agree with the finding of the master incorporated in the decree that, "it has not been shown that the defendants were harmed because of the failure of the said complainant to carry out the written agreement entered into between them or that they parted with any consideration in recognition thereof."

We have carefully examined the terms of the first trust deed and find no provision therein which, either expressly or by implication, authorized plaintiff to execute the contract in question, and there is no claim that it was authorized by the court. The trust deed by its terms prescribed and restricted plaintiff's authority to deal with the trust property and it must be presumed that defendants, having executed the indenture creating the trust estate, had knowledge of the limitation of power of the trustee contained therein, and that he could not legally bind the bondholders by such contract.

For the reasons indicated herein the decree of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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the former that it was not a good idea to have a new one built and that it was not a good idea to have a new one built and that it was not a good idea to have a new one built.

Two years of investigation later still to ascertain all the names of the persons who were in the room at the time of the shooting.

the written agreement entered into between them or that they

⁴ Thermal stability of polyacetylenes was also studied.

James Smith and his associates had been in the village ever since

and the no provision therein shall be

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

and there is no other way to get it out of the country.

[†] *Staphylococcus aureus* and *Escherichia coli* were used as test strains.

humans of whom it has always been said that they are rational.

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For the reasons outlined above the system of the

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2. **LONG-TERM**

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37190

HAROLD J. GREEN,

Plaintiff in Error,

v.

MARGARETH JAROSZ, also known as
MARGARET SAROSSY,

Defendant in Error,

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 621¹

MRS. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court by the plaintiff upon a writ of error to review the record, wherein the court, without aid of a jury, upon a trial found the issues against the plaintiff, vacated the judgment of December 30, 1932, entered by confession, and entered judgment for the defendant. This action is based upon a promissory note containing a warrant of attorney to confess judgment, executed by the defendant on October 5, 1932. The plaintiff obtained a judgment by confession for \$186.54, in the Municipal Court of Chicago. Upon motion, after judgment, made by the defendant, she was allowed to plead a defense, the judgment to stand as security. The note in negotiable form, with a warrant of attorney to confess judgment, was payable to the order of the Chicago Electric Appliance Mfg. Co., and by this company endorsed without recourse and delivered to the plaintiff, who contends that he was the holder of the note before maturity and in due course.

Upon the day and date of the execution of the note, the defendant also entered into a contract with the payee company named in the note, agreeing to purchase an oil burner from the payee for \$179.50, payable \$25 in cash upon the installation of the burner, and the balance in 12 monthly installments, beginning November 5, 1932. Two weeks after the execution of the contract and note, and before the first payment was due, the contract and note were endorsed by the payee company to the plaintiff, who is now the holder of the promissory note and the contract.

1930

HAROLD J. BAKER

Plaintiff in Error

v.

MARGARET L. BAKER, also known as
MARGARET L. BAKER

Defendant in Error

OFFICE OF CLERK OF COURT

CHICAGO, ILLINOIS

IN CHARGE

279 I.A. 621

THE PRESIDING JUSTICE HAD DELIVERED THE OPINION OF THE COURT. This case is in this court by the plaintiff upon a writ of error to review the record, wherein the court, without aid of a jury, upon a trial and the issues of fact and law, rendered the judgment of December 30, 1928, entered by confession, and entered judgment for the defendant. This action is based upon a promissory note executed by a warrant of attorney to confess judgment, executed by the defendant on January 1, 1929. The plaintiff obtained a judgment by confession for \$186.84, in the Municipal Court of Chicago. Upon motion, after judgment, made by the defendant, she was allowed to plead a defense, the judgment to stand as a security. The note in negotiable form, with a warrant of attorney to confess judgment, was payable to the order of the Chicago Electric Appliance Mfg. Co., and by this company endorsed without recourse and delivered to the plaintiff, who contends that he was the holder of the note before maturity and in due course.

Upon the day and date of the execution of the note, the defendant also entered into a contract with the payee company named in the note, agreeing to purchase an oil burner from the payee for \$175.50, payable \$35 in cash upon the installation of the burner, and the balance in 12 monthly installments, beginning November 5, 1928. Two weeks after the execution of the contract and note, and before the first payment was due, the contract and note were assigned by the payee company to the plaintiff, who is now the holder of the promissory note and the contract.

3

The facts in the record establish that the plaintiff at the time of the purchase of the note in question was attorney for the paper company, and received as part of the transaction the promissory note and the contract.

From the facts it is apparent that the plaintiff had knowledge the consideration for the execution of the promissory note was the installation of an oil burner to be used and operated to heat the building occupied by tenants of the defendant. The facts also indicate that the oil burner failed to heat the premises. This fact was borne out by the witness Aaron Stoller, the agent of the Appliance Mfg. Co., wherein he testified that upon a visit to the defendant's premises, he found the burner failed to heat the premises, and notified the company of this fact; that the oil burner has been removed by the defendant and the building is now being heated by the use of coal.

A tenant who occupied the premises at the time the burner was installed, testified to the fact that the burner when in operation failed to furnish heat and that he had to use a stove to keep his premises properly heated until the furnace in which the oil burner had been installed was removed and the premises heated by use of coal.

The plaintiff contends that he is a holder in due course; that failure of consideration is not competent evidence against the plaintiff; that he became holder of the defendant's promissory note before maturity for value, without notice of any infirmity in the instrument. However, the question to be determined is was the plaintiff when he purchased the note, together with the contract for the installation of an oil burner in the premises of the defendant, properly charged with the conditions of the contract entered into by the parties.

From the evidence, the plaintiff obtained the promissory note, together with the contract signed by the defendant. This

[illegible]

contract provided for the installation of an oil burner for the heating of the defendant's premises, and the plaintiff had knowledge that the consideration for the note was the installation of an oil burner by the Chicago Electric Appliance Mfg. Co., there being no express warranty contained in the contract the Company impliedly warranted that the oil burner was fit for the purpose of heating the defendant's premises, and sufficient for the purpose intended.

The evidence indicates that the oil burner failed of its purpose and was removed by the defendant, after notice to the Appliance Company by its agent of the failure of the burner to properly heat the premises, and as a result of such failure there was a failure of consideration in the execution of the note by the defendant. Seeburg Piano Co. v. Lindner, et al, 231 Ill. App. 94; Hallook v. Cutler, 71 Ill. App. 471. This court in the case of McKeown v. Dyniewicz, 83 Ill. App. 509, upon the question of an implied warranty, said:

"A mechanic who undertakes to construct and furnish mechanical apparatus for a particular purpose, impliedly agrees that when constructed it will be reasonably sufficient for the purpose for which it is intended. The law implies in the case of all such contracts, in the absence of an express agreement or clear intention to the contrary, that the apparatus furnished shall be reasonably sufficient for the purpose. Springdale Cemetery Assoc. v. Smith, 32 Ill. 252."

From the facts as they appear in the record, we believe the court was justified in its finding for the defendant, and there being no reversible error in the record, the judgment entered by the court is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

The evidence indicates that the oil burner failed of its purpose intended, and sufficient for the purpose intended. The defendant's premises, and sufficient for the purpose intended. The defendant's premises, and sufficient for the purpose intended.

purpose and was removed by the defendant, after notice to the

Appliance Company by its agent of the failure of the burner to properly

It had the promise, and as a result of such failure there was a

subject of investigation in the execution of the duty of the defendant.

7. NOVEMBER : 28. THU. III 188. In the morning. v. 20. 188. 1888

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: 11.2.1998

It is further stated that the undersigned has undertaken to construct and furnish a certain number of houses for a certain number of years, and that the undersigned has undertaken to construct and furnish a certain number of houses for a certain number of years, and that the undersigned has undertaken to construct and furnish a certain number of houses for a certain number of years.

From the facts as they appear in the record, we believe the court was justified in its finding for the defendant, and there being no reversible error in the record, the judgment entered by the court

*-MIRIOLA INHIBIT

• 1980 • 12 • JAN 24 MON

37219

HERMAN H. BECKER,

(Complainant) Defendant in Error,

v.

CHARLES A. BECK, ELLEN H. BECK, wife
of said Charles A. Beck, FRANK N.
REED, FLORA M. REED, STANLEY L. FABIAN
and OSCAR V. HUNT, et al.,

(Defendants) Plaintiffs in Error.

WRIT OF ERROR TO

SUPERIOR COURT

COOK COUNTY.

279 I.A. 621²

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is a writ of error directed to the Superior Court of Cook County to review the record, wherein the complainant filed a bill of complaint to foreclose a certain trust deed securing the payment of three notes, aggregating the principal sum of \$4,500, bearing interest at 6% per annum until due, evidenced by coupon notes, and 7% after maturity.

To secure the payment of the notes, Charles A. Beck and Ellen H. Beck, his wife, executed and delivered a trust deed, conveying the real estate therein described. The bill of complaint made certain defendants parties to the bill, and upon the issues being joined and defaults taken as to certain defendants, the cause was referred to a master in chancery of the Superior Court, who reported on the law and the facts, and recommended that a decree be entered for the sale of the real estate described.

Upon objections being filed to the report, which were overruled by the master, such objections were considered by the court as exceptions to the report, and after consideration, the master's report was approved and a decree entered for the sale of the real estate described in the trust deed, to satisfy the payment of the principal notes and interest coupons.

Defendants Charles A. Beck and Ellen H. Beck contend that they are the makers of the notes and mortgage, and the owners of the

THIS

NEWMAN H. BROWN,

WIT OF ERROR TO

(Complaint) returned in error,

DEPOSITION STATE

W.

DO NOT WRITE

WITNESS I, JOHN W. BROWN, Clerk of said Court, do hereby certify that the within and ORDER V. BROWN, of date...

(Defendants) Plaintiff in error.

2791 A. 1881

THE FOLLOWING STATEMENT IS MADE BY THE DEED:

This is a writ of error directed to the Superior Court

of said County in error in the record, wherein the complaint filed

a bill of complaint to recover a certain sum of money and

interest of three notes, aggregating the principal sum of \$1,000,

bearing interest at 6% per annum until due, evidenced by coupon notes,

and 1/2 after maturity.

To secure the payment of the notes, Charles A. Beck and

Allen M. Beck, his wife, executed and delivered a trust deed, convey-

ing the real estate therein described. The bill of complaint made

certain statements as to the bill, and upon the same being

joined and returned upon it to the Superior Court, who reported

thereon to a master in chancery of the Superior Court, who reported

on the law and the facts, and recommended that a decree be entered

for the sale of the real estate described.

Upon objection being filed to the report, which was

overruled by the master, such objection was consolidated by the

court as exceptions to the report, and after consideration, the master

report was approved and a decree entered for the sale of the real

estate described in the trust deed, to satisfy the payment of the

principal notes and interest coupons.

Defendants Charles A. Beck and Allen M. Beck contest that

they are the authors of the notes and coupons, and the heirs of the

property described therein, and are necessary parties, and as to them the decree is void for want of service of summons.

The summons, dated March 12, 1931, directed to the April term, was served upon all defendants except Charles A. Beck and Ellen M. Beck, and as to these defendants the summons was returned, "not found". Service on the defendants named, however, was by a copy of the bill of complaint served upon them in California, with notice of the commencement of suit, and for failure of the defendants Charles A. Beck and Ellen M. Beck to appear and file a demurrer or answer to the bill of complaint, they were defaulted.

The decree recites -

"that the defendants Charles A. Beck and Ellen M. Beck wife of said Charles A. Beck were each personally duly served with a copy of the bill of complaint herein and a notice of the commencement of this suit more than 30 days prior to the 1st day of the May Term, A. D., 1931, of this Court."

In the consideration of the contention of defendants Charles A. Beck and Ellen M. Beck, his wife, that there was want of service of summons upon these defendants, the question arises can these defendants complain of want of service in this court for the first time upon a writ of error? This question is important, for if it follows there was want of service upon the named defendants, the chancellor was without jurisdiction of the persons of these defendants, and the decree entered foreclosing their respective rights in and to the real estate described therein was void. Upon this question the court was without assistance of counsel, nor was it aided in the consideration of this problem.

We have made an examination of the authorities of this state, and find the rule to be that a defendant named in a proceeding, either at law or in equity, may question for the first time in this court upon a writ of error the trial court's jurisdiction of the person of the defendant and its right to enter a default and judgment

the degree is void for want of notice of summons.

Charles A. Beck and Ellen M. Beck to appear and file a demurrer or answer to the bill of complaint, they were defaulted.

"that the defendants Charles A. Book and Ellen M. Book
right of said Charles A. Book were each personally duly
served with a copy of the bill of complaint herein and
- notice of the commencement of this suit was given to
- date prior to the last day of the last term, to-wit: 1911,
of this court."

[illegible]

We have made an examination of the authorities of this state, and find the wife to be that defendant named in a proceeding
other of her or an agent, and declare the law that in this
court none will be given the same except a possession of the
same of the defendant and the right to enter a judgment and judgment

where there is want of proper service of summons upon the defendant, as provided for by law.

In the case of Filkins v. O'Sullivan, et al, 79 Ill. 524, it appears service of summons was had by a special deputy sheriff upon the defendant. The return of the deputy sheriff was not verified by oath or by his affirmation before some officer competent to administer an oath, as required by the law of this state. Judgment was entered by default, and the court held that the defendant could take advantage of the lack of service in compliance with the statute for the first time in the Supreme Court. To the same effect is the case of Hansen v. Klicka, 78 Ill. App. 177, where the court held that where a decree makes a person an apparent party and recites service upon him by publication, establishes a lien upon his land and orders it sold and the proceeds paid to others, he has a legal right to resort to a writ of error to secure its reversal, although he was not served with process in the suit. See also People v. Evans, 262 Ill. 235.

The return showing service of a copy of the bill of complaint, notice of the commencement of the suit upon the Becks must be within the time allowed by law, and the time of the service must appear from the return, properly sworn to before an officer empowered to administer oaths. It appears from the return filed in this case, to which is attached a copy of the bill of complaint and notice of the commencement of the suit, that the return was signed and sworn to by Robley E. George, of Los Angeles, California, on March 23, 1931, before E. H. Clausen, who purported to be a notary public, and from the seal attached it appears that he was a notary public in "Los Angeles Co. Cal."; that no certificate was attached that E. H. Clausen was a notary public empowered to administer an oath to the affiant, as required by Sec. 14, Chap. 22, Chancery Act (Cahill's Ill. Rev. St. 1929).

where there is want of proper service of summons upon the defendant.

In the case of WILLIAMS v. WILLIAMS, 22 Ill. 234, it appears service of summons was had by a special deputy sheriff upon the defendant. The return of the deputy sheriff was not verified by oath as to his execution of duty upon return of summons to administer an oath, as required by the law of this state. Judgment was entered by default, and the court held that the defendant could take advantage of the lack of service in compliance with the statute for the first time in the supreme court. To the same effect is the case of WILLIAMS v. WILLIAMS, 78 Ill. App. 177, where the court held that a return which is not verified by oath and does not state service upon him by publication, established a lien upon his land and orders it sold and the proceeds paid to others, he has a legal right to resort to a writ of error to secure its reversal, although he was not served with process in the suit. See also

WILLIAMS v. WILLIAMS, 78 Ill. App. 177.

The return showing service of a writ of error will not establish notice of the commencement of the suit upon the books must be within the time allowed by law, and the time of the service must appear from the return. Properly stated in return an affidavit is required to establish same. It appears from the return filed in this case, in which is attached a copy of the bill of complaint and notice of the commencement of the suit, that the return was signed and sworn to by a notary public, who purported to be a notary public, and from the fact stated in evidence that he was a notary public in this state, it is held that no affidavit was required that E. H. Cushman was a notary public empowered to administer an oath to the defendant, as required by law. It is held that the return is not valid, and the judgment is reversed.

It is to be noted from the statute that the officer administering the oath must be empowered to do so at the place where the oath is administered. Service of a copy of the bill of complaint and notice of the commencement of the suit, must strictly comply with the provisions provided for by the statute of this state, and failure to meet the requirement that the purported officer must be empowered to administer oaths at the place where administered, is fatal.

In the instant case there is no certificate that the purported notary public had the power to administer oaths, nor does it appear that the named notary public certified under his official seal that he had such authority in the state where the oath was administered. Trevor v. Colgate, 181 Ill. 129; Desnoyers Shoe Co. v. First National Bank, 188 Ill. 312.

For want of service provided for by the statute of this state, the court was without jurisdiction to default defendants Charles A. Beck and Ellen H. Beck, his wife. They were proper and necessary parties, being the makers of the notes secured by the trust deed now sought to be foreclosed. The service conferred no jurisdiction of the persons of these defendants, and it follows that they were not before the court, notwithstanding the court in its decree found that it had jurisdiction of the persons of Charles A. Beck and Ellen H. Beck, his wife.

We have reserved to the hearing complainant's motion to strike the certificate of evidence, which appears in the record and was filed subsequently to the signing of the decree. The certificate was allowed, presented, and signed by the Chancellor, within the time fixed, at the time of the entry of the decree. No objections were made by the complainants when the certificate was signed and filed, and what appears to be a part of the proceedings may properly be incorporated in the certificate, which has a bearing upon the

It is to be noted from the statute that the officer administering the oath must be empowered to do so at the place where the oath is administered. Service of a copy of the bill of complaint and notice of the commencement of the suit, must strictly comply with the provisions provided for by the statute of this state, and failure to meet the requirement that the purported officer must be empowered to administer oaths at the place where administered, is fatal.

In the instant case there is no certificate that the purported notary public had the power to administer oaths, nor does it appear that the named notary public certified under his official seal that he had such authority in the state where the oath was administered. Ex parte V. G. Galt, 128 Ill. 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For want of service provided for by the statute of this state, the court was without jurisdiction to default defendants Charles A. Beck and Ellen H. Beck, his wife. They were proper and necessary parties, being the makers of the notes secured by the trust deed now sought to be foreclosed. The service conferred no jurisdiction of the persons of these defendants, and it follows that they were not before the court, notwithstanding the court in its decree found that it had jurisdiction of the persons of Charles A. Beck and Ellen H. Beck, his wife.

We have reserved to the hearing complainant's motion to set aside the certificate of judgment, which appears in the record and was filed subsequently to the signing of the decree. The certificate was not signed, returned, and signed by the clerk, which is required by the statute, at the time of the entry of the decree. No objection was made by the complainant when the certificate was signed and filed, and this would be a part of the proceedings and properly be incorporated in the certificate, which has a bearing upon the

question of service upon the defendants Charles A. Beck and Ellen H. Beck. The motion with therefore be denied.

Other questions have been called to our attention, but we do not deem it important to decide them at this time.

For the reasons stated the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, J. CONCURS

WILSON, J. SPECIALLY CONCURRING:

From a reading of the record it is apparent that the real contestants to the decree are Frank H. Reed and Flora M. Reed, his wife, who are in possession of the premises by reason of a contract to purchase and that they have been in possession for a considerable length of time and apparently will continue so to be. The defendants Charles A. Beck and Ellen H. Beck, his wife, never appeared by a motion to quash the service and are appearing on this writ of error represented by the same counsel that represents Frank and Flora Reed. From the authorities cited in the main opinion it can be adduced that a writ of error will lie to review a summons which does not comply with the statute. The Supreme Court of this state in the case of Trevor v. Colgate, 181 Ill. 129, has held that such summons is void. While I am concurring in the main opinion, I feel that it would have been the proper practice for the defendants Beck to have appeared in the lower court and made a proper motion to quash the service in order to provide the complainant with an opportunity to secure a better writ. So far as the record discloses they received a copy of the bill of complaint and the omission in securing the certificate of magistracy could have been corrected by amendment.

The purpose of process is to serve notice on a defendant. Process that is irregular can be quashed by a plea in abatement or a

question of service upon the defendants Charles A. Beck and Ellen M. Beck. The motion with therefore be denied.

Other questions have been called to our attention, but we do not deem it important to decide them at this time.

For the reasons stated the decree is reversed and the case remanded.

REVEREND AND HONORABLE

JUDGE, U. S. DISTRICT COURT

WILLIAM A. HENNING, COUNSELLOR

From a reading of the record it is apparent that the real contestants in the decree are Frank M. Beck and Flora M. Beck, his wife, who are in possession of the premises by reason of a contract to purchase and that they have been in possession for a considerable length of time and apparently will continue so to be. The defendants Charles A. Beck and Ellen M. Beck, his wife, never appeared by a motion to quash the service and are appearing on this writ of error represented by the same counsel that represents Frank and Flora Beck. From the authorities cited in the main opinion it can be shown that a writ of error will lie to review a summons which does not comply with the statute. The Supreme Court of this state in the case of Trotter v. Trotter, 181 Ill. 123, has held that such a summons is void. While I am concurring in the main opinion, I feel that it would have been the proper practice for the defendants Beck to have appeared in the lower court and made a proper motion to quash the service in order to provide the complainant with an opportunity to secure a better writ. So far as the record discloses they received a copy of the bill of complaint and the omission in securing the certificate of regularity will have been corrected by amendment.

The purpose of process is to serve notice on a defendant. Process that is irregular can be quashed by a plea in abatement or a

motion. These matters should be injected into the case at the earliest opportunity by the defendant. The defendants Reed had no concern with the process as related to the defendants Beck. The counsel that represented the Reeds in the proceeding is now here representing the Becks.

In my opinion, while the Supreme Court has called a similar summons void, it should be considered as irregular and voidable and the proper forum in which to correct it should be the court of original instance. If no process whatsoever had been served, a bill of review would lie in the Circuit Court to vacate the decree.

notion. These matters should be referred into the hands of the
earliest opportunity by the defendant. The defendant's need has no
concern with the process as related to the defendant's book. The
counsel that represented the State in the proceeding is now

now representing the State.

In my opinion, while the Supreme Court has called a
similar summons void, it should be considered as irregular and
voidable and the proper forum in which to correct it should be
the court of original instance. If no process whatsoever had been
served, a bill of review would lie in the Circuit Court to vacate

the judgment.

37239

DORA SWIDLER,

(Plaintiff) Appellee,

v.

TOWER AUTOMOBILE CORPORATION,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT OF

CHICAGO.

279 I.A. 621³

MR. PRESIDING JUSTICE HESSEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court for the plaintiff in the sum of \$557.50 in an action of assumpsit upon a certain first mortgage real estate bond in the principal sum of \$500, dated April 1, 1928, due April 1, 1933, bearing interest at 7% per annum after maturity, signed by the defendant and payable to the holder thereof. To this action defendant filed an affidavit of merits.

Upon the trial of the issues it was stipulated by the parties that the plaintiff was the holder and owner of the bond sued upon and that the same was the obligation of the defendant and was properly signed and executed; that nothing had been paid upon the principal sum of said bond; that the bond was due by its terms, and all interest had been paid to maturity. The document was received in evidence, and provides, among other things, that -

"Both principal and interest are payable in the manner more specifically described in the Indenture hereinafter referred to ***.

For a description of the mortgaged property, the nature and extent of the security, and the rights and limitations on the rights of the bondholders, reference is made to said Indenture, to all provisions of which the holder of this bond does by the act of becoming such holder agree."

It was also stipulated that defendant's exhibit 1 is the trust deed securing the plaintiff's bond, and that the trust deed was properly executed and recorded, and authenticated. It was further stipulated by the parties that the plaintiff made no demand upon the trustee to institute any action, nor did she join with any number of bondholders,

STATE

IN SENATE

(Plaintiff) Appellee

v.

TOPEKA AUTOMOBILE CORPORATION

(Defendant) Appellant

CHICAGO

289 T.A. 621

MR. PRESIDING JUSTICE WHEEL DELIVERED THE OPINION OF THE COURT.
 This is an appeal by the defendant from a judgment entered
 in the Municipal Court for the plaintiff in the sum of \$527.50 in an
 action of assumpsit upon a certain first mortgage real estate bond in
 the principal sum of \$500, dated April 1, 1928, due April 1, 1932,
 bearing interest at 7% per annum after maturity, signed by the defend-
 ant and payable to the holder thereof. To this action defendant filed
 an affidavit of merits.

Upon the trial of the issues it was stipulated by the
 parties that the plaintiff was the holder and owner of the bond and
 upon and that the same was the obligation of the defendant and was
 properly signed and executed; that nothing had been paid upon the
 principal sum of said bond; that the bond was due by its terms, and
 all interest had been paid to maturity. The document was received
 in evidence, and provided, among other things, that -

"This principal and interest are payable in the manner more
 specifically described in the Indenture hereinafter referred
 to as 'the mortgage property,' the nature and
 extent of the security, and the rights and limitations on the
 rights of the bondholder, were known to and by said Indenture,
 to all provisions of which the holder of this bond was by
 the act of becoming such holder aware."

It was also stipulated that defendant's exhibit 1 is the trust deed
 securing the plaintiff's bond, and that the trust deed was properly
 executed and recorded, and authenticated. It was further stipulated
 the parties that the plaintiff made no demand upon the trustee to
 institute any action, nor did she join with any number of bondholders

either the requisite number provided in the trust deed, or others, in any demand upon the trustee, and that the trustee did not refuse to act pursuant to a demand.

In defense of this action, the defendant introduced the deed of trust from the Tower Automobile Corporation, as mortgagor, to the First Trust and Savings Bank, as Trustee. The trust deed provides, in part - under Section 6 -

"Whenever under the provisions hereinabove contained it shall have become the duty of the Trustee to institute legal proceedings upon the written request of the requisite number of bondholders, and upon the deposit or tender of deposit of the requisite number of bonds with the trustee, and upon tender of proper indemnity, and the Trustee shall have wrongfully or unreasonably refused or failed to act within sixty (60) days after such request and deposit or tender of deposit of bonds as aforesaid and on tender of indemnity, then and in any such case, but under no other condition, the same number of bondholders who under the provisions hereof have the right to demand action by the Trustee, may jointly institute such proceedings in law or equity as it was the duty of the Trustee to institute, but for the equal benefit of all holders of the bonds and coupons then outstanding. *** No action at law or in equity shall be brought by, or on behalf of, the holder or holders of any bonds or coupons, whether or not the same be past due, except by the Trustee or by the requisite number of bondholders acting in concert under the provisions of this Section for the benefit of all bondholders. In the event that pursuant to the terms hereof the holders of twenty-five (25%) or more in principal amount of bonds then outstanding shall have joined in exercising the right to act in lieu of the Trustee, the remainder of the bondholders shall have the right to institute any legal proceedings of the same or a similar character for the same default of the Mortgagor."

The opinion of this court in the case of Cummings v.

Michigan-Lake Building Corporation, No. 37197, is material upon the questions involved in the instant case. The form of action and the facts are similar. The language of the bond in the case before us is somewhat the same as the language of the bond in the Cummings case. The language of the bond in the Cummings case is as follows:

"Both principal and interest are payable in the manner more specifically described in the indenture hereinafter referred to, *** For a description of the mortgaged property, the nature and extent of the security, and the rights and limitations on the rights of the bondholders, reference is made

in any demand upon the trustee, and that the trustee did not refuse to pay the demand.

provided in part - under section 6 - to the First and Savings Bank, as Trustee. The trust deed of trust from the Tower Automobile Corporation, as mortgagor, in defense of this action, the defendant introduced the

[illegible]

The opinion of this court in the case of United States v. ... is material upon the ...
The language of the bond in the ... case is as follows:

to said Indenture, to all provisions of which this bond and each coupon hereto attached are subject, with the same effect as if the same were herein fully set forth.*** Said Indenture and this bond, as well as all of the other bonds secured by said Indenture, are to be taken and considered together as parts of one and the same contract."

The defendant in the Cummings case contended that the bonds sued upon and the trust deed referred to therein are, by the recital of the bond itself to be taken and considered together as parts of one contract, and the bondholders are precluded under any circumstances from maintaining this action at law. This court in its opinion said:

"This position was in accord with the defense set up in the affidavit of merits. In the very recent decision of our Supreme Court in Oswianza v. Mengler and Mandell, Inc., (Doc. No. 22474 - Agenda 42 - June, 1934) the court stated that 'the rule which plaintiff in error would invoke as to the necessity for reading all terms of one contract into another made at the same time and as a part of the same transaction does not apply to cases of this kind. Sturgis Nat. Bank v. Harris Trust and Savings Bank, supra, (351 Ill. 465), and cases there cited.' Since that decision defendant has changed its position and has, by leave of court, filed a 'supplemental memorandum', in which it calls attention to the Oswianza decision and 'submits the following propositions:

(a) That the question of negotiability is not involved in this case; (b) That the bond in this case contains appropriate language to incorporate therein by reference the no-action clause of the trust deed, and that under the holding in the Oswianza case *supra*, the judgment of the lower court should be affirmed.'

Our decision is controlled by the Oswianza case, wherein the trust deed, contained the same provisions as are relied upon by the defendant in the instant case, and the bonds contained the following language:

'Said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract. *** Both principal and interest bear interest after maturity thereon at the rate of seven per cent (7%) per annum and are payable in the manner described in the trust deed. *** For a description of the mortgaged property and the nature and extent of the security reference is made to said trust deed, to all of the provisions of which this bond and each coupon hereto attached are subject, with the same effect as if said trust deed were herein fully set forth.'

* * *

In the 'supplemental memorandum' defendant contends that the bonds, by reason of the words which we have italicized, 'contain appropriate language to incorporate therein by reference the no-action clause of the trust deed,' and argues that the

to said indenture, to all provisions of which this bond
and each coupon hereto attached are subject, with the
same effect as if the same were herein fully set forth.***

The defendant in the foregoing case contended that the bonds were
upon and the trust deed referred to therein are, by the recital of
the bond itself to be taken and considered together as parts of one
contract, and the defendant's contention was sustained by the court.

This position was in accord with the balance set up in
the affidavit to wit: In the very recent decision of
the Supreme Court in Central v. Central, 100 U.S. 346
(U.S. No. 22174 - 1878), it was held that the same effect
shall be given to the recital of the trust deed as if the
same were fully set forth in the bond itself, and as a part of the
same transaction. This was the result of the case of
Central v. Central, 100 U.S. 346, and cases there cited. Since that decision
the defendant has changed its position and now, by leave of
court, files a 'supplemental memorandum', in which it calls
attention to the Central decision and submits the following
propositions:

(a) That the question of negotiability is not involved in
this case; (b) That the bond in this case contains
no language to incorporate therein by reference
the recited clause of the trust deed, and that under the
holding in the Central case, the judgment of the
lower court should be affirmed.
The defendant is controlled by the Central case,
because the trust deed, contained the same provisions as are
recited above by the defendant in the instant case, and the
court controlled the following language:
'Said trust deed and this bond, as well as all the
other bonds attached, are to be taken and considered
together as parts of one and the same contract.*** Both
indented and detached bond interest shall maturely thereon
as the rate of seven per cent (7%) per annum and are payable
in the manner recited in the trust deed.*** For a
description of the various coupons, and the nature and
extent of the various provisions in said bond and each coupon,
to all of the provisions of which this bond and each coupon
hereto attached are subject, with the same effect as if said
trust deed were herein fully set forth.***'

In the Central case, the defendant's contention was sustained by the court,
and the same effect was given to the recital of the trust deed as if the
same were fully set forth in the bond itself, and as a part of the
same transaction. This was the result of the case of
Central v. Central, 100 U.S. 346, and cases there cited. Since that decision
the defendant has changed its position and now, by leave of
court, files a 'supplemental memorandum', in which it calls
attention to the Central decision and submits the following
propositions:

Oswianza case sustains this contention. We do not agree with the contention nor argument. All of the provisions contained in the second paragraph of the bonds have to do with the trust deed and the rights conferred by it upon the bondholders, and the limitations on the right of the bondholder if he would seek to enforce the trust deed. As stated by the court in Enoch v. Branden, 349 N. Y. 263, 269, wherein a similar question was involved, a purchaser scanning the bonds would think that the obligor was speaking solely of the security, and ' he would interpret the statement that the bonds were secured by and entitled to the benefits and subject to the provisions of the mortgage, as meaning that the foreclosure or other relief might be had thereunder only subject to its provisions.' In the Oswianza case the court stated that negotiability was not a prime factor in determining whether the plaintiff had the right to sue at law, but that there was no language in the bond which fairly incorporated, by reference, the no-action clause of the trust deed, and that, therefore, the plaintiff, the owner of bonds, had a right to sue at law."

In the case of Cummings v. Michigan-Lake Building Corporation, supra, the court passed upon the same questions involved in the instant case, which opinion we will follow. Therefore, the trial court did not err in finding for the plaintiff and entering judgment for \$557.50. The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL AND WILSON, JJ. CONCUR.

37290

WALTER WOZNICKI, a minor, by MATHEW
WOZNICKI, his next friend,

Defendant in Error,

v.

C. G. OSTERBERG, doing business as
C. G. OSTERBERG and SON,

(Defendant).

CARL E. OSTERBERG,

Plaintiff in Error.

WRIT OF ERROR TO

SUPERIOR COURT

COOK COUNTY.

279 I.A. 621⁴

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Superior Court of Cook County and prosecuted by Carl E. Osterberg, as a defendant, from a judgment for \$17,500 entered by the court upon a hearing before the court and a jury in an action of trespass to recover damages for personal injuries sustained on June 19, 1926, by Walter Woznicki, a minor.

The declaration of the plaintiff by his next friend alleges that the plaintiff was thirteen years of age at the time of the accident, and further alleges that C. G. Osterberg and Carl E. Osterberg, doing business as C. G. Osterberg and Son, by their agents, negligently operated an automobile truck on Western Avenue at 31st Street, in Chicago, Illinois, on June 19, 1926, and injured the plaintiff; that defendant Carl E. Osterberg filed his plea of the general issue, non-ownership, non-operation, and that he was not associated with Charles G. Osterberg at the time of the accident. Upon the trial the plaintiff dismissed as to the defendant Carl E. Osterberg, it appearing from the evidence that this defendant died on March 29, 1926, prior to the date of the accident.

STATE

IN SENATE, JANUARY 1, 1906.

REPORT OF THE

COMMISSIONER OF THE

STATE

OF THE

STATE

1905-1906

STATE

STATE

THE

This cause is in this court upon a writ of error directed to

the Superior Court of Cook County and prosecuted by Carl E. Osterberg,

as a defendant, from a judgment for \$17,500 entered by the court upon

a hearing before the court and a jury in an action of trespass to

recover damages for personal injuries sustained on June 13, 1905,

by Walter L. Osterberg, a minor.

The location of the accident by his next friend states

that the plaintiff was thirteen years of age at the time of the

accident, and further alleges that G. G. Osterberg and Carl E. Osterberg

being business as G. G. Osterberg and Son, by their agents, negligently

operated an automobile truck on Western Avenue at 31st Street, in

Chicago, Illinois, on June 13, 1905, and injured the plaintiff; that

defendant Carl E. Osterberg filed his plea of the general issue, non-

ownership, non-operation, and that he was not associated with Charles

G. Osterberg at the time of the accident, upon the trial the plaintiff

dismissed as to the defendant Carl E. Osterberg, it appearing from

the evidence that this defendant was an agent of the plaintiff,

the date of the accident.

From the evidence the facts are substantially that the plaintiff's minor was about ten years of age; that prior to the accident he was walking on the east side of Western Avenue which is a north and south street, towards 31st Street with his brother Joe Wozniaki, who was about thirteen years of age at that time; that upon the day of the accident the boys were looking in store windows while walking along Western Avenue toward its intersection with 31st; that 31st Street does not extend east of Western Avenue, but extends in a westerly direction.

There is conflict in the evidence as to what the plaintiff did upon starting west from Western Avenue at 31st Street. The evidence offered by the plaintiff is to the effect that the plaintiff stopped at the curb on Western Avenue at 31st Street and waited for a chance to cross Western Avenue. A southbound street car, proceeding on the southbound track on Western Avenue, had stopped at the north side of 31st Street, when the plaintiff proceeded on the crosswalk directly across the street in a westerly direction on the north side of 31st Street. After the plaintiff had started and was in the street, the street car proceeded, and to avoid being struck by the car, the plaintiff stopped at or near the east rail of the northbound street car tracks, waiting for the street car to pass, and while standing at this point in the street he was struck by the defendant's truck; that before crossing he looked to the south and saw the truck, which was about 200 to 250 feet south coming north from the bridge located at the drainage canal; that the truck was traveling at a fast rate of speed; that the driver did not give any warning of his approach by the use of the horn, and that his truck struck the plaintiff and he was thrown a distance of about ten feet and injured.

The evidence of the defendant is that the driver stopped

From the evidence the facts are substantially that the

plaintiff's minor was about ten years of age; that prior to the accident he was walking on the east side of Western Avenue which is a north and south street, towards East Street with his brother Joe Kewicki, who was about thirteen years of age at that time; that upon the day of the accident the boys were looking in store windows while walking along Western Avenue toward its intersection with East; that East Street does not extend east of Western Avenue, but extends in a westerly direction.

There is conflict in the evidence as to what the plaintiff

did upon striking east from Western Avenue at East Street. The

evidence offered by the plaintiff is to the effect that the

plaintiff stopped at the curb on Western Avenue at East Street and

waited for a car to pass in front of him. A northbound street

car, proceeding on the northbound track on Western Avenue, and

stopped at the north side of East Street, when the plaintiff pro-

ceeded on the northbound track. The street is a westerly

direction on the north side of East Street. After the plaintiff had

started and was in the street, the street car proceeded, and to

avoid being struck by the car, the plaintiff stepped at or near the

east rail of the northbound street car tracks, waiting for the

street car to pass, and while standing at this point in the street

he was struck by the defendant's truck; that before crossing he

looked to the north and saw the truck, which was about 200 to 250

feet south coming north from the bridge located at the bridge

crossing; that the truck was traveling at a fast rate of speed; that

the driver did not give any warning of his approach by the use

of the horn, and that his truck struck the plaintiff and he was

thrown a distance of about ten feet and injured.

The evidence of the defendant is that the driver stopped

at the bridge to the south, a distance of about 250 feet, for traffic; that when the defendant's driver neared 31st Street he saw the boys coming out from between two automobiles parked on the right-hand side of the street. He operated the horn and, at the time, he was going at a speed of about fifteen miles an hour. The older of the two boys stopped and grasped the younger boy by the hand, and as the truck was about opposite the boys, the plaintiff let go of his brother's hand and started to cross the street. The driver swerved the truck and proceeded about fifteen feet and stopped. Plaintiff, however, collided with the right-hand fender as the driver swerved the truck, and was thrown to the ground and suffered injuries for which he now seeks to recover.

From the medical testimony in the record it appears that the left leg of the plaintiff's minor was severely injured, and that at the time of the trial was almost seven inches shorter than the right. The left knee was stiff. The thigh, ankle and toe motion was normal, but there was a space in the middle of the thigh where the bones seemed to be separated and the plaintiff was required to use crutches, and according to the medical evidence, the boy's left leg is useless and should be amputated.

The question is was the driver as the agent of the defendant in the operation of the automobile truck, guilty of negligence, and was the plaintiff free from contributory negligence? These two questions were questions of fact for the jury.

The jury by its verdict considered the plaintiff's evidence of the occurrence the most credible, which was to the effect that the plaintiff while on the north cross-walk at 31st Street, standing in the east car tracks, looked south and saw an automobile truck about 250 feet on Western Avenue at the drainage canal bridge, and while he was waiting for the southbound car to pass, the defendant's automobile approached from the south at a fast rate of speed and

at the bridge on the north, a distance of about 250 feet, for
 traffic; that when the defendant's driver noticed that there he
 saw the boys coming on from between two automobiles parked on the
 right-hand side of the street. He operated the horn and, at the
 time, he was going at a speed of about fifteen miles an hour. The
 order of the two boys stopped and grasped the younger boy by the
 hand, and as the truck was about opposite the boys, the plaintiff
 let go of his brother's hand and started to cross the street. The
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 as the driver swerved the truck and was thrown to the ground and
 suffered injuries for which he now seeks to recover.

From the medical testimony in the record it appears that
 the left leg of the plaintiff's minor was severely injured, and
 that at the time of the trial was almost seven inches shorter than
 the right. The left knee was stiff. The thigh, ankle and toe
 motion was normal, but there was a space in the middle of the thigh
 where the bones seemed to be separated and the plaintiff was required
 to use crutches, and according to the medical evidence, the boy's
 left leg is useless and should be amputated.

The question is was the driver at the time of the defendant
 in the operation of the automobile truck, guilty of negligence, and
 was the plaintiff free from contributory negligence? These two
 questions were questions at issue for the jury.

The jury by its verdict considered the plaintiff's evidence
 of the occurrence the most credible, which was to the effect that
 the plaintiff while on the north cross-walk at 21st Street, standing
 in the east car smoke, looked south and saw an automobile truck
 about 250 feet on Western Avenue at the drainage canal bridge, and
 while he was waiting for the southbound car to pass, the defendant's
 automobile approached from the south at a fast rate of speed and

struck Walter Wornicki, the plaintiff, who was in plain view of the driver, and caused the injury. The view of the position of the boy at the time of the accident was not obstructed, and if the driver of defendant's truck had looked he would have seen the plaintiff and his position on the car track, and if he failed to note the place where the boy was standing, then of course he was negligent in the operation of the truck and caused the injury. In any event, the driver, in the operation of the automobile truck, should have proceeded with caution so as not to injure plaintiff. The driver, when called as a witness, testified to the fact that he did not see the boy until the auto truck reached 31st Street, where he swerved the truck and the boy ran into the front fender of the car and was injured. His testimony would indicate that he did not see the boy until he swerved his truck. His evidence upon this point is not altogether satisfactory, and the jury rightfully, when they considered all the evidence, returned a verdict for the plaintiff.

We are satisfied that in the operation of the motor truck defendant's agent was negligent and the plaintiff, a lad of ten years of age, exercised such degree of care and caution as one of his age, intelligence, experience and capacity would have exercised and ordinarily used at the time of the occurrence.

We having indicated that the verdict and judgment entered by the court, upon denial of defendant's motion for a new trial, was justified, what we have said upon that question disposes of defendant's contention that the verdict is against the manifest weight of the evidence.

The contention that the court erred in instructing the jury upon the question of damages, upon the ground that the assessment of damages is not limited to the evidence appearing in the record, is without merit. From an examination of this instruction, we find it

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struck Walter Womack, the plaintiff, who was in plain view
of the driver, and caused the injury. The view of the position
of the boy at the time of the accident was not obstructed, and it
the driver of defendant's truck had looked he would have seen the
plaintiff and his position on the car track, and it he failed to
note the place where the boy was standing, then of course he was
negligent in the operation of the truck and caused the injury. In
any event, the driver, in the operation of the automobile truck,
should have exercised due caution to see and to know plaintiff.
The driver, when called as a witness, testified to the fact that
he did not see the boy until the auto truck reached 31st Street,
where he swerved the truck and the boy ran into the front fender of
the car and was injured. His testimony would indicate that he did
not see the boy until he swerved his truck. His evidence upon this
point is not altogether satisfactory, and the jury rightfully, when
they considered all the evidence, returned a verdict for the plaintiff.
We are satisfied that in the operation of the motor truck
defendant's agent was negligent and the plaintiff, a lad of ten
years of age, sustained some degree of loss and injury as one of
his age, intelligence, experience, and capacity would have exercised
and ordinarily met at the time of the occurrence.
The finding indicated that the verdict and judgment
entered by the court, was based on defendant's failure to see
plaintiff, what we have said upon that question dispose
of defendant's contention that the verdict is against the manifest
weight of the evidence.
The contention that the court erred in instructing the jury
upon the question of damages, upon the ground that the assessment of
damages is not limited to the evidence appearing in the record, is
without merit. From an examination of this instruction, we find it

states the rule fairly upon the question involved, and requires the jury, in assessing damages, to be guided by the evidence.

This instruction, in somewhat the same form, was approved by the Supreme Court of this state in the case of Donk Bros. Coal Co. v. Thil, 226 Ill. 232, and Cicero Street Ry. Co. v. Brown, 193 Ill. 274.

The refusal by the court to give defendant's offered instruction No. 21, which is in this form -

"The Court instructs the jury that if they believe from the evidence, that the injury done to the plaintiff was the result of the fault or negligence of the plaintiff, or the fault or negligence of both, the plaintiff and defendant, then the plaintiff cannot recover, and the jury must find for the defendant."

was proper, and this instruction is not applicable to the facts in the instant case. The instruction should have been qualified to include the rule that a child of ten years of age is required to use only such degree of care and caution as one of his age, experience and capacity would exercise under the same or similar circumstances.

The damages, while large, are not excessive when we consider the plaintiff was in the hospital three years; his left leg is permanently injured, so that the leg cannot be used, and the plaintiff is using crutches and will use them the rest of his life, unless the leg is amputated, and then even if an artificial leg may be used, he will still remain a cripple. It will not be necessary to repeat the nature of the injury, as it is sufficiently set forth in the facts herein stated. We are of the opinion that the damages are not excessive.

There being no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

states the rule fairly upon the question involved, and requires the jury, in rendering damages, to be guided by the evidence.

This instruction, in substance the same form, was approved

by the Supreme Court of this state in the case of Bank v. ...

v. Hall, 202 Ill. 625, and Chicago Street Ry. Co. v. Brown, 102 Ill. 274.

The refusal by the court to give defendant's offered

instruction No. 31, which is in this form -

"The court instructs the jury that if they believe from the evidence, that the injury done to the plaintiff was the result of the fault or negligence of the plaintiff, or the fault or negligence of both, the plaintiff and defendant, then the plaintiff cannot recover, and the jury must find for the defendant."

was proper, and this instruction is not applicable to the facts in the instant case. The instruction should have been qualified to include the rule that a child of ten years of age is presumed to be only such degree of care and caution as that of his age, intelligence, and capacity would require under the facts of similar circumstances. The charges, while proper, are not accurate when so considered. The plaintiff was in the hospital three weeks; his left leg is permanently injured, so that the leg cannot be used, and the plaintiff is using crutches and will use them the rest of his life, unless the leg is removed, and even then it is probable it may be lost. It will still remain a cripple. It will not be necessary to reveal the nature of the injury, as it is sufficiently set forth in the facts herein stated. We are of the opinion that the damages are not excessive.

There being no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

37353

OSCAR GOTTSCHALK,

(Plaintiff) Appellant,

v.

ANNA REIF and STELLA NASIOPULOS,

(Defendants)

ANNA REIF,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 6221

MR. PRESIDING JUSTICE HOBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court on appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago in favor of the defendant Anna Reif in an action in the nature of an assumpsit proceeding.

The action by the plaintiff was based upon a promissory note in the principal sum of \$1,000 and accrued interest. Stella Nasiopulos, the maker of the note, and Anna Reif, the endorser, were defendants. On October 10, 1930, Anna Reif, the owner, endorsed and delivered the note to the plaintiff. The maker of the note, Stella Nasiopulos, after service of summons, was in default for want of an appearance, and the cause came on for trial against the defendant Anna Reif. Upon a hearing, the court, on November 9, 1933, without the aid of a jury, entered judgment for costs against the plaintiff. To this action of the plaintiff, for recovery of the amount of the note due, the defendant Anna Reif on August 24, 1933, filed an affidavit of merits, which was stricken by the court, and upon leave being granted, the defendant filed an amended affidavit on October 13, 1933.

It appears that Anna Reif, prior to October 10, 1926, was the owner of certain real estate in Cook County, Illinois, which she sold on October 10, 1926 to Stella Nasiopulos, co-defendant, and received from her as part purchase price, a promissory note for \$1,000,

CHAS. H. HARRIS, JR.

(Plaintiff)

v.

ANNA WEIT and HERMAN HARRIS WEIT,

(Defendants)

ANNA WEIT,

Appellee.

OF CHICAGO,

279 I.A. 622

ALL PARTIES HERETO HAVE BEEN ADVISED BY THE CLERK OF THE COURT.

This cause is in this court on appeal by the plaintiff from a judgment entered in the Municipal Court of Chicago in favor of the defendant Anna Weit in an action in the nature of an assumpsit promissory.

The action by the plaintiff was based upon a promissory note in the principal sum of \$1,000 and accrued interest. Stella Vasilevich, the maker of the note, and Anna Weit, the endorser, were witnesses. On October 10, 1930, Anna Weit, the owner, endorsed and delivered the note to the plaintiff. The maker of the note, Stella Vasilevich, after service of summons, was in default for want of appearance, and the cause came on for trial against the defendant Anna Weit. On a verdict for the plaintiff, the court, without the aid of a jury, entered judgment for costs against the plaintiff. In this action of the plaintiff for recovery of the amount of the note due, the defendant Anna Weit on August 14, 1931, filed an affidavit of denial, which was returned by the court, and upon leave being granted, the defendant filed an amended affidavit on October 13, 1933.

It appears that Anna Weit, prior to October 10, 1930, was the owner of certain real estate in Cook County, Illinois, which she sold on October 10, 1930 to Stella Vasilevich, co-defendant, and received from her as part purchase price, a promissory note for \$1,000.

and ten interest coupon notes, all of which were secured by a trust deed upon the real estate; that Anna Reif held the principal note until October 25, 1930, and during that time collected the accrued interest and surrendered the matured interest coupons that had been paid; that on October 25, 1930, the defendant Anna Reif was indebted to the plaintiff, her former husband, upon a certain judgment entered in the Municipal Court, and to satisfy the judgment, made part payment in cash, and endorsed and delivered the note of \$1,000, together with two interest coupon notes, not yet due, to the plaintiff. The principal note bears the endorsement of the defendant Anna Reif in these words:

"In consideration of the sale and purchase of the within note by Oscar Gottschalk, I hereby guarantee the payment of the same with interest thereon from October 25, 1930."

At the time of the delivery of the note the plaintiff delivered to this defendant his executed release, dated October 25, 1930, by which the plaintiff released the defendant "from all claims or demands from the beginning of the world to the present date." Did the plaintiff release the defendant from all claims by the representation of her former attorney, who acted for the plaintiff, that upon the endorsement of the note in question she was so released by the plaintiff?

The defendant admitted the endorsement of the note in question secured at the time by Andrew Rost, Jr., attorney for the plaintiff, as payment, and the payment of part cash to satisfy a judgment obtained by the plaintiff against her for borrowed money. This attorney had been her counsel, but not in matters relating to the present litigation. The defendant testified that in a conversation of the attorney with the defendant at his home, this attorney advised the defendant to consult an attorney, but stated in the presence of Mrs. Rost's wife and the defendant's son that the signing of her name on the back of the note was but a formality; that the

and the interest coupons were paid, all of which were secured by a trust deed upon the real estate; that Anna held the principal note until October 22, 1930, and during that time collected the secured interest and surrendered the interest coupons that had been paid; that on October 22, 1930, the defendant Anna will was indebted to the plaintiff, her former husband, upon a certain judgment entered in the Municipal Court, and to satisfy the judgment, made part payment in cash, and entered and delivered the note of \$1,000, together with her interest coupons, not yet due to the plaintiff. The plaintiff now seeks the enforcement of the defendant Anna's will

"In consideration of the sale and purchase of the within note of \$100,000.00, I hereby guarantee the payment of the same with interest thereon from October 22, 1932."

the defendant from the beginning of the year of the present date. Did the plaintiff release the defendant from all claims by the representative of her former attorney, she asked for the plaintiff, that same the endorsement of the note in question she was so released by the

The defendant admitted the endorsement of the note in question occurred at the time he issued it, although for the plaintiff's request, and the payment of part cash to satisfy a judgment entered up in the plaintiff's favor for the amount of \$100.00. This attorney had been her counsel, but not in matters relating to the present litigation. The defendant testified that in a conversation of the attorney with the defendant at his home, this attorney advised the defendant to execute an affidavit, and asked in the presence of Mrs. Hunt's wife and the defendant's son that the signing of her name on the back of the note was but a formality; that the

payment of part cash and her endorsement of the note settled all claims between the plaintiff and the defendant.

There is evidence that upon default in payment of the promissory note by the maker when due, a written notice of the default was given to the defendant by the plaintiff, which she denied having received. A notice to produce certain letters addressed and mailed to the defendant, was served upon the attorney for the defendant by plaintiff's attorney. The letters not being produced upon the trial, copies were admitted in evidence, marked Exhibits 2 and 3, bearing date November 18, 1931 and February 16, 1932, respectively. From the tenor of the letters it appears the defendant was notified that the maker Stella Nasiopulos defaulted in payment of the note endorsed by the defendant, and that the plaintiff would proceed against the defendant unless the amount due was paid upon her written endorsement and guaranty of the note. A notice appears in the record addressed to Stella Nasiopulos to produce a certain letter addressed and mailed to her, in which she was notified of the maturity of the promissory note signed by her. This letter was not produced, and a copy of the letter signed by the plaintiff's attorney notifying Stella Nasiopulos of the maturity of the promissory note was admitted in evidence.

The record does not disclose that the defendant is unable to read or that an artifice was used by the plaintiff to prevent the defendant from reading the form of the endorsement and guaranty which appeared on the back of the promissory note in question; nor was she prevented from informing herself as to liability upon signing the endorsement appearing on the note. The defendant, however, denied liability as endorser, but apparently was willing to accept a release, signed by the plaintiff and delivered to her, of all claims against

payment of part cash and her endorsement of the note settled all claims between the plaintiff and the defendant.

There is evidence that upon default in payment of the

promissory note by the maker when due, a written notice of the

default was given to the defendant by the plaintiff, which she denied

having received. A notice to produce certain letters addressed and

mailed to the defendant, was served upon the attorney for the defend-

ant by plaintiff's attorney. The letters not being produced upon

the trial, copies were admitted in evidence, marked Exhibits B and

C, bearing date November 12, 1931 and February 12, 1932, respectively.

From the terms of the letters it appears the defendant was notified

that the maker Stella Kestelovich defaulted in payment of the note

endorsed by the defendant, and that the plaintiff would proceed

against the defendant unless the amount due was paid upon her written

demand, and guaranty of the note. A notice appears in the record

addressed to Stella Kestelovich to produce a certain letter addressed

and mailed to her, in which she was notified of the maturity of the

promissory note signed by her. This letter was not produced, and a

copy of the letter signed by the plaintiff's attorney notifying

Stella Kestelovich of the maturity of the promissory note was admitted

in evidence.

The record does not disclose that the defendant is unable

to read or that an affidavit was made by the plaintiff to prevent the

defendant from reading the form of the endorsement and guaranty which

appeared on the back of the promissory note in question; nor was she

prevented from informing herself as to liability upon signing the

endorsement appearing on the note. The defendant, however, denied

liability as endorser, but apparently was willing to accept a release,

signed by the plaintiff and delivered to her, of all claims against

her, including the satisfaction of the judgment against the defendant for money borrowed from the plaintiff. This attitude of the defendant, however, is not borne out by the facts in the record, and it would seem rather inequitable for her to accept the satisfaction of the judgment in question without paying the consideration to the plaintiff for his action in that regard.

It does not appear the evidence is satisfactory that a fraud was practiced upon the defendant. Evidence of fraud must be clear and satisfactory; it is not in this case. Another trial will be necessary, and this court does not desire to comment further upon the facts. The judgment for the defendant is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

her, including the satisfaction of her judgment against the defendant
for money borrowed from the plaintiff. This attitude of the defendant,
however, is not borne out by the facts in the record, and it would
seem rather incredible for her to accept the satisfaction of the
judgment in question without paying the consideration to the plaintiff
the sum of \$1000 in that regard.

It does not appear the evidence is satisfactory that a
trial was provided upon the defendant. Evidence of fraud must be
clear and satisfactory; it is not in this case. Another trial will
be necessary, and this court does not desire to conduct further work
on this. The judgment for the defendant is accordingly reversed
and the cause remanded.

REVEREND AND HONORABLE.

CLERK OF THE COURT, ST. LOUIS.

37362

LUBERTUS KOSTER,

(Plaintiff) Appellee,

v.

CHAS. H. BRANDT & CO., INC., a
corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 622²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause was tried in the Municipal Court of Chicago upon an amended statement of claim filed by the plaintiff and upon the issues formed by the proof submitted at the trial. The court entered a judgment upon a finding against the defendant Chas. H. Brandt & Company, Inc., for \$100, and dismissed the action as to the defendant Harry C. Swanstrom. The defendant company brings this appeal.

Plaintiff's evidence tends to establish that he procured a purchaser for certain real estate owned by the plaintiff and his wife; that the defendant agreed to and did act as the plaintiff's agent in securing the execution of a written contract and in receiving part payment of the purchase price; that a written contract was signed by the plaintiff and Axel Bort and Hana Bort, wherein Axel Bort and Hana Bort agreed to purchase the real estate for the sum of \$2300, and to assume a mortgage of \$1500; that \$100 earnest money was paid, and \$700, the balance of the purchase price was to be paid upon delivery of the deed. It also appears from the evidence that the \$100 earnest money was paid to Harry C. Swanstrom, an employee of the defendant company, by Michael Bernick, attorney for the purchasers, and that Bernick testified to the effect that he paid \$100 to Swanstrom to be held by him, together with the contract, until Swanstrom received a telephone message that Bernick's clients had returned the \$100 advanced by him.

2577

PETRA LUTHER

no longer (1719-19)

4

CHAS. H. WELCH, JR. & COMPANY, INC.
NEW YORK

• 1911-1912 (1911-1912)

222. A T 075

THURSDAY MAY 20 1968

This cause was tried in the Municipal Court of Chicago

WFOO has 17.9% of the market share in the station's service area.

THE COURT, said, and to determine that the Court is not bound by the Court's decision.

...a judgment upon a finding that the defendant was a ...

of no matter what business you, COB, got, and, what a threat

Journal of Management Education 30(6)br/>DOI: 10.1177/0095687406289111
© The Author(s)
10.1177/0095687406289111
<http://jme.sagepub.com>

1700000

a boundary of that relation if and only if it involves "intimacy"

unpublished for certain real estate owned by the Plaintiff and his wife;

that the defendant intended to send his wife to the United States and that he was a "fugitive" at the time he was arrested.

Each university in the country will be asked to contribute its own

movement of the language which is written and to be learned by

the following information:

10000 To use and get estate the real estate for the use of 10000

and to secure a further \$1500 to complete the same.

and 1800, the balance of the purchase price was to be paid upon

CONFIDENTIAL

ad + 900 [unclear] as mentioned - I want to find out how many teenagers

Attorney for the undersigned

Document of 005. b6 and b7C: 198320 add at bottom of page 198320

with 100% accuracy than with the standard test answers available.

and Self-Regulation

It further appears from the evidence that the Borts did not want to go through with the deal, and Bernick, requested and received the \$100 advanced by him to Swanstrom. Swanstrom advised the plaintiff by letter that he had returned the earnest money "because Bernick could not collect the earnest money which he advanced when you were at our office Saturday. He returned the abstract to us today, so we had to refund the \$100."

It also appears that after hearing the testimony of Michael Bernick, a witness offered by the defendant, the court interrupted the submission of further proof on behalf of the defendant "to prove the same facts by Mr. Swanstrom as testified to by Mr. Bernick." The court then intimated his reason for refusing to hear further evidence for the defendant by stating -

"He will testify the same way. No use taking the time to hear him. Now are you going to get around the parol evidence rule in this case. ***"

The contract in question was signed by Axel Bort and Hana Bort, his wife, the purchasers of the real estate, as well as by the plaintiff, and contained the terms and conditions of the purchase. As a part of the purchase price \$100 was received by the agent of the plaintiff, and the abstract of title to the property was delivered to the purchasers. The agent, without authority from the plaintiff, returned the money so paid to the purchasers' attorney and receipted for the abstract of title delivered to the purchasers.

The defense to this suit, from the agent's evidence, is that at the time the \$100 was paid and received by the agent of the plaintiff, the money was paid conditionally by the purchasers' attorney, with the understanding that the contract was to be held until the money was returned by the purchasers to their attorney. The money was not so returned, and upon demand of the attorney for the purchasers, it was returned by the agent of the plaintiff, and the purchasers refused to perform their contract. The evidence does not disclose

It further appears from the evidence that the Borts did not want to go through with the deal, and Bernick, represented and received the \$100 advanced by him to Swannstrom. Swannstrom advised the plain- tiff by letter that he had returned the earnest money "because Bernick could not collect the earnest money which he advanced when you were at our office Saturday. He returned the abstract to us today, so we had to return the \$100."

It also appears that after hearing the testimony of Michael Bernick, a witness offered in the defendant, the court instructed the submission of further proof on behalf of the defendant "to prove the same facts by Mr. Swannstrom as testified to by Mr. Bernick." The court then intimated his reason for refusing to hear further evidence for the defendant by stating -

"I will satisfy the same way. He was telling the time of that time. Now are you going to get around the parcel evidence rule in this case."

The contract in question was signed by Axel Bort and Hans Bort, his wife, the purchasers of the real estate, as well as by the defendant, and contained the terms and conditions of the purchase. A part of the purchase price \$100 was received by the agent of the plaintiff, and the abstract of title to the property was delivered to the purchasers. The agent, without authority from the plaintiff, re- turned the money so paid to the purchasers' attorney and receipted for the abstract of title delivered to the purchasers.

The defense to this suit, from the agent's evidence, is that at the time the \$100 was paid and received by the agent of the plain- tiff, the money was paid conditionally by the purchasers' attorney, with the understanding that the contract was to be held until the money was returned by the purchasers to their attorney. The money was not so returned, and upon demand of the attorney for the purchasers it was returned by the agent of the plaintiff, and the purchasers refused to perform their contract. The evidence does not disclose

the plaintiff agreed the money was to be received by his agent conditionally, nor that the plaintiff empowered the agent to return the money upon demand of the purchasers' attorney.

We have examined the record and are unable to find any evidence that the plaintiff understood the money was received conditionally by his agent. An agent is only empowered to act for his principal upon the authority conferred, and may act if within the scope of his authority. Unless the money was received conditionally^{and} was agreed to by the plaintiff, the agent of the plaintiff in accepting delivery of the contract conditionally was acting without authority.

There is no question that between the parties to a contract, evidence may be admitted to show a written document was not to take effect as a valid agreement until the occurrence of some future contingency. Sugar v. Marinello, 260 Ill. App. 85. But this rule does not apply to the facts in the instant case. The plaintiff did not agree with Axel Bort and Hana Bort, his wife, the purchasers, that the contract was to be delivered to the agent and received by the plaintiff conditionally. The agent of the plaintiff acted without authority, and by so acting he assumed the risk when he returned the money to the purchasers' attorney without first obtaining consent of the plaintiff. The case being a fourth class case, the evidence is sufficient and controlling upon the questions of fact involved, and the court properly entered judgment for the plaintiff.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

The plaintiff agrees the money was to be received by his agent and
conditionally, not that the plaintiff empowered the agent to return
the money upon demand of the purchasers' attorney.

It has examined the record and the exhibits to find only

evidence that the plaintiff understood the money was received condition-
ally by his agent. An agent is only empowered to act for his

principal upon the authority conferred, and may act if within the
scope of his authority. Unless the money was received conditionally

was agreed to by the plaintiff, the agent of the plaintiff in accept-
ing delivery of the contract conditionally was acting without authority.

There is no question that between the parties to a contract,

plaintiff may be admitted to show a written document was not to take

effect as a valid agreement until the occurrence of some future

event. Money v. Harrison, 100 Ill. App. 2d. But this rule

does not apply to the facts in the instant case. The plaintiff did

not agree with Axel Nord and Hans Nord, his wife, the purchasers, that

the contract was to be delivered to the agent and received by the

plaintiff conditionally. The agent of the plaintiff acted without

authority, and by so acting he assumed the risk when he returned the

money to the purchasers' attorney without first obtaining consent of

the plaintiff. The case being a fourth class case, the evidence is

entirely and conclusively upon the question of fact involved, and

the court properly entered judgment for the plaintiff.

WILSON AND HALL, J. J. JUDGE.

WILSON AND HALL, J. J. JUDGE.

37478

FRANK R. EAGER,

(Plaintiff) Appellee,

v.

TABER MILL, INC., a corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

979 T A. 222³

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$671.29, entered in the Superior Court of Cook County, in favor of the plaintiff, in an action of assumpsit. To this action the defendant filed its plea to the jurisdiction in the nature of a plea in abatement objecting to the service of process and jurisdiction of the court.

The plea set forth, in substance, that the defendant was a Massachusetts corporation; that it never transacted business in the State of Illinois, and never qualified for that purpose. It is further alleged by the defendant in its plea, that the defendant was engaged in the business of manufacturing shirts, ties, pyjamas and similar goods; that it sold its products at various times to the residents of the State of Illinois by solicitors who solicited orders from prospective purchasers in Illinois, on a commission basis; that the orders procured would be forwarded to the main office of the defendant at New Bedford, Massachusetts, for acceptance, and if accepted by the defendant, the merchandise contracted for would be sent C.O.D. by mail from New Bedford, Massachusetts to the purchaser's address; that the defendant conducted no transactions of any kind in the State of Illinois other than those stated.

The plea further set out that William P. Martin, upon whom service of summons was had, was not at any time authorized by the defendant corporation to do or transact any business on its behalf as an officer of the corporation.

FRANK R. WARD, JR.

(Plaintiff) Appellee,

SUPERIOR COURT

COOK COUNTY,

vs.

(Defendant) Appellant.

97074 2003

MR. FREDERICK JUSTICE HADAL DELIVERED THE VERDICT OF THE COURT.

This is an appeal by the defendant from a judgment for

\$571.38, entered in the Superior Court of Cook County, in favor of the plaintiff, in an action of assumpsit. To this action the defendant filed its plea to the jurisdiction in the nature of a plea in abatement objecting to the service of process and jurisdiction of the court.

The plea set forth, in substance, that the defendant was a Massachusetts corporation; that it never transacted business in the State of Illinois, and never carried on any business there. It is further alleged by the defendant in its plea, that the defendant was engaged in the business of manufacturing shirts, ties, pyjamas and similar goods; that it sold its products at various times to the residents of the State of Illinois by solicitors who solicited orders from prospective purchasers in Illinois, on a commission basis; that the orders procured would be forwarded to the main office of the defendant at New Bedford, Massachusetts, and it is alleged by the defendant, the merchandise contracted for would be sent O.G.D. by mail from New Bedford, Massachusetts to the purchaser's address; that the defendant conducted no transactions of any kind in the State of Illinois other than those stated.

The plea further set out that William F. Martin, upon whom service of summons was had, was not at any time authorized by the defendant corporation to do or transact any business on its behalf as an officer of the corporation.

The plaintiff filed a replication where it was alleged.

"that the return on the writ of summons was true and that William F. Martin was at the time of said service of summons upon him, an authorized agent of the defendant company."

A hearing was had before the court, without a jury, and evidence was introduced by the parties upon the issue made by the plea, and the court found the issues for the plaintiff. The defendant elected to stand by its plea and thereupon was defaulted for failure to plead to the declaration, and, upon a hearing, the court entered the judgment appealed from.

The defendant maintains that the filing of the plea in abatement was proper practice, and that the trial court erred in its finding against the defendant upon a hearing of its defense as alleged in the plea. The rule of law is that in an action to recover the amount alleged to be due the plaintiff, want of a license in the defendant to do business as a foreign corporation is no defense.

No question was raised by the defendant as to whether the contract, in and of itself, was made in violation of the law.

In the case of Ross v. New South Farm & Home Co., 191 Ill. App. 353, there is an interesting discussion by the court as to the right of a defense such as is set forth in the plea of abatement offered by the defendant. The court said:

"Section 67c, ch. 32, Hurd's R. S. (J. & A. Pars. 2527), which prohibits foreign corporations of certain kinds from doing business in this State without being first licensed by the Secretary of State, was enacted for the protection of persons dealing with such corporation and not for the protection of the corporation against those with whom it deals. No foreign corporation is bound to comply with that statute. It may refrain from so doing and be safe, provided it at the same time refrains from transacting business and exercising its corporate powers here. If it undertakes to transact business or exercise its corporate powers in this State without complying with this statute, it does so at its own risk."

In the case of Pinch & Co. v. Zenith Furnace Co., 245 Ill. 586, the Supreme Court of this State held that a contract of a

The complaint filed a week and a half after it was alleged.

...the fact that he was not a member of the ...

For failure to plead to the declaration, and, upon a hearing, the defendant elected to stand by its plea and thereupon was defaulted. The court found the issues for the plaintiff. The evidence was introduced by the parties upon the issues made by the hearing was held before the court, without a jury, and

in the defendant to do business as a foreign corporation is no
recovery the amount alleged to be due the plaintiff, want of a license
alleged in the plea. The rule of law is that in an action to
findings against the defendant upon a hearing of its defense as
statement was proper practice, and that the trial court erred in its
The defendant maintains that the filing of the plea in

in and of itself, was made in violation of the law. No question was raised by the defendant as to whether the defense.

In the case of *Nease v. New South Wales & Home Co.*, 11

was offered to the defendant. The court said:

[illegible]

In the case of *Windsor & Co. v. Scottish Insurance Co.*, 245 111.

the Supreme Court of this State held that a contract of

foreign corporation does not violate the statute prohibiting a foreign corporation from transacting business, holding or disposing of property, or maintaining a suit in the courts of this State unless it shall have complied with certain requirements. It is not a violation of the statute for a foreign corporation to enter into a contract with a citizen of this state for the purchase of personal property in this state, and for a breach of the contract, if such occurs, such corporation may maintain an action for the recovery of damages, provided the contract is but a single transaction. It is apparent that if the defendant could maintain an action for a breach of contract, as we have outlined, the plaintiff could maintain his action, even if the defendant was not licensed to do business as a foreign corporation in this State.

Upon the question of service of summons upon the agent of the defendant company, we have examined the record and are satisfied that the service of summons by the sheriff of Cook County upon William F. Martin was a proper one. The evidence in the record clearly shows that Martin was an agent of the defendant company; that he appeared voluntarily in this State in order to ascertain what claim the plaintiff had against the defendant company, and for the purpose of transacting business for the company. The service of summons was in compliance with the statute.

The defendant having stood by its plea of abatement, which we have indicated was not a proper one, and without offering any other defense, the court properly entered judgment for the plaintiff in the sum of \$671.29. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

foreign corporation does not violate the statute prohibiting a foreign

corporation from transacting business, holding or disposing of property, or maintaining a suit in the courts of this state unless it shall have complied with certain requirements. It is not a vio-

lation of the statute for a foreign corporation to enter into a contract with a citizen of this state for the purchase of personal property in this state, and for a breach of the contract, if such occurs, such corporation may maintain an action for the recovery of damages, provided the contract is but a single transaction. It is apparent that if the defendant could maintain an action for a breach of contract, as we have outlined, the plaintiff could maintain his action, even if the defendant was not licensed to do business as a foreign corporation in this state.

Upon the question of service of summons upon the agent of the defendant company, we have examined the record and are satisfied

that the service of summons by the sheriff of Cook County upon William F. Martin was a proper one. The evidence in the record clearly shows that Martin was an agent of the defendant company; that he appeared voluntarily in this state in order to ascertain what claim the plaintiff had against the defendant company, and for the purpose of transacting business for the company. The service of summons was in compliance with the statute.

The defendant having stood by his plea of abatement, which we have dismissed, we will a proper one, and return nothing any other business, the court having entered judgment for the plaintiff in the sum of \$10,000. The judgment is accordingly affirmed.

WILLIAM W. WALKER, J.

37242

NATHAN GELLER,

Plaintiff in Error,

v.

UNITED STATES UNDERWRITERS COMPANY,
a Corporation,

Defendant in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 622⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal Court of Chicago to recover damages alleged to be due under a policy of insurance issued to plaintiff by defendant, by the terms of which plaintiff was insured against loss by theft of his automobile, its equipment, or any extra parts thereof.

In his statement of claim, plaintiff alleges that on September 26th, 1932, his automobile was stolen from his garage located at 1333 Lawndale Avenue, Chicago, was recovered by the police, and that he then ascertained that certain accessories and parts of the value of \$300.00 had been taken therefrom. Defendant insists that the claim is fraudulent in that the car and parts were not stolen, as alleged, but that plaintiff, in conspiracy with others, took the parts from the car, or caused them to be so taken, and falsely represented to defendant that the car and parts had been stolen. The hearing was before the court without a jury, the court found for defendant and entered judgment against plaintiff for costs. The appeal is by plaintiff from this judgment.

Plaintiff testified in substance that on the day in question at about 12 o'clock he put the car in the garage back of his house, locked the ignition and the door of the garage; that in the morning he opened the door of the garage and saw that the car was gone; that he made a report to the police and saw the agent of the insurance company; that he signed a proof of loss in the office of the agent

37523

NATHAN SWANSON,

Plaintiff in Error,

v.

UNITED STATES INSURANCE COMPANY,
a corporation,

Defendant in Error.

OF CHICAGO.

37523 I.A. 332

MR. JUSTICE WILL DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal Court of Chicago to recover damages alleged to be due under a policy of insurance issued to Plaintiff by defendant, by the terms of which Plaintiff was insured against loss by theft of his automobile, the contents of any other items located.

In his statement of claim, Plaintiff alleges that on

September 28th, 1932, his automobile was stolen from his garage located at 1212 Franklin Avenue, Chicago, and recovered by the police and that he then ascertained that certain accessories and parts of the value of \$100.00 had been stolen therefrom.

That the claim is fraudulent in that the car and parts were not stolen as alleged, but that Plaintiff is conversely with respect to the parts from the car, as stated above to be stolen, but Plaintiff

represented to defendant that the car and parts had been stolen.

The hearing was before the court without a jury, the court found for defendant and entered judgment against Plaintiff for costs. The

appeal is by Plaintiff from said judgment.

Plaintiff testified in substance that on the day in question

at about 12 o'clock he put the car in the garage back of his house, looked the ignition and the door of the garage; that in the morning he opened the door of the garage and saw that the car was gone; that he made a report to the police and saw the agent of the insurance company; that he signed a proof of loss in the office of the agent

of the defendant company; that thereafter he was notified by the police that the car had been found and that the tires, springs, front fenders, lamps, headlights and axle were gone; that the agent of defendant company agreed to pay \$335.00 and costs of storage in settlement of plaintiff's claim; that all the missing parts were replaced at a cost of \$137.00, and that the repairing cost was from \$35.00 to \$40.00. This witness on cross-examination further testified in substance that he had made a prior claim on a policy issued by the Chicago Motor Club when this same car was stolen on a previous occasion, when five wheels were taken off and that the claim was settled for \$145.00; that he also had a claim against defendant company for two tires and a spot light in August, 1932, and that during nine years he had five claims regarding this same car.

Louis Geller, a brother of plaintiff, testified that he paid \$140.00 to one Warshawsky for parts and \$8.00 for towing the car.

Saul Geller, a witness for defendant, testified in substance that he is a nephew of the plaintiff; that on September 26th, 1932, he met plaintiff on the street, and that plaintiff told the witness he would like to strip the car and collect \$300.00 insurance on it; that the witness told him he would have nothing to do with the matter; that a few minutes later a man came along, and that defendant told the witness he was the person who was going to strip the car; that they (meaning the plaintiff and the person mentioned) went away together, and that about two hours after he saw plaintiff come into his (plaintiff's) house bringing the wheels of the car; that plaintiff told him he would give the car away to his brother and would collect \$300.00 for insurance, and that plaintiff stated that he had collected money in this way before. On cross-examination this witness stated ~~in substance~~ that six wheels were brought into the house by plaintiff that night.

of the defendant company; that thereafter he was notified by the police that the car had been found and that the tires, springs, fenders, lamps, headlights and axle were gone; that the agent of defendant company agreed to pay \$325.00 and costs of storage in settlement of plaintiff's claim; that all the missing parts were replaced at a cost of \$127.00, and that the remaining cost was from \$35.00 to \$40.00. This witness on cross-examination further testified in substance that he had made a prior claim on a policy issued by the Chicago Motor Club when this same car was stolen on a previous occasion, that the witness was paid \$17 and that the claim was settled for \$145.00; that he also had a claim against defendant company for two tires and a spot light in August, 1932, and that during nine years he had five claims regarding this same car.

Paula Miller, a brother of plaintiff, testified that he paid \$140.00 to one Karamanly for parts and \$2.00 for towing the car. Paul Miller, a witness for defendant, testified in substance that he is a nephew of the plaintiff; that on September 28th, 1932, he met plaintiff on the street, and that plaintiff told the witness he would like to strip the car and collect \$300.00 insurance on it; that the witness told him he would have nothing to do with the matter; that a few minutes later a man came along, and that defendant told the witness he was the person who was going to strip the car; that they (meaning the plaintiff and the person mentioned) went away together, and that about two hours after he saw plaintiff come into his (plaintiff's) house bringing the wheels of the car; that plaintiff told him he would give the car away to his brother and would collect \$300.00 for insurance, and that plaintiff stated that he had collected money in this way before. On cross-examination this witness stated that the wheels were brought into the house by plaintiff's brother.

The record indicates that the witness, Saul Geller, and plaintiff had some controversy about financial affairs and were not friendly. However, in view of the fact that the court below saw and heard the witnesses, and, from their manner and mode of testifying, and from all the circumstances in the case, was given the opportunity to determine the truth as to the matters in controversy, we feel that we are not justified in disturbing the finding and judgment. Therefore, the judgment is affirmed.

AFFIRMED

HEBEL, P.J. AND WILSON, J. CONCUR.

The record indicates that the witness, Saul Geller, and plaintiff had some controversy about financial affairs and were not friendly. However, in view of the fact that the court below and heard the witnesses, and, from their manner and mode of testifying, and from all the circumstances in the case, was given the opportunity to determine the truth as to the matters in controversy, we feel that we are not justified in disturbing the finding and judgment.

ATTORNEYS

REINHOLD, F. J. AND WILSON, J. CONCUR.

37246

THE WEST SIDE TRUST & SAVINGS BANK
OF CHICAGO, a Corporation,

Appellant,

v.

B. ARSHAN or ORSHAN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 623¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against plaintiff for costs entered in an action of forcible entry and detainer, brought to obtain possession from defendant of an apartment in a building located at 1545 South Keeler Avenue in Chicago. It is admitted that plaintiff, The West Side Trust & Savings Bank, was trustee under a mortgage trust deed on the land and the building in which the apartment is located, and that plaintiff, as such trustee, took possession of the premises in question in August, 1932. Whether such possession was obtained by order of court, or otherwise, the record does not disclose. On July 26th, 1933, defendant moved into the apartment without the consent of plaintiff, and without stating to plaintiff his intention to do so. On July 28th, 1933, defendant was served by plaintiff with a demand for immediate possession of the premises. Subsequently, the action in question was begun, the complaint filed, in which it is alleged that defendant unlawfully withholds the possession of the premises, and on September 15th, 1932, after a hearing, the court found the defendant not guilty. Following this finding, the judgment for costs was entered against plaintiff, from which judgment this appeal is being prosecuted.

By what right or claim of right defendant holds possession of the premises, is not clear. The abstract recites that "defendant is rumored to be the owner of the equity and moved in five weeks before the trial." The trust deed referred to is not in the record, and the record is vague as to whether defendant is or is not the owner

THE WEST SIDE TRUST A SAVINGS BANK
OF CHICAGO, a Corporation

CHICAGO, ILL.

CHICAGO, ILL.

E. ARSHAN or ORSHAN,

Plaintiff.

279 L.A. 623

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against plaintiff for costs entered in an action of forcible entry and detainer, brought to obtain possession from defendant of an apartment in a building located at 1540 Grand Avenue, Chicago. It is admitted that plaintiff, The West Side Trust A Savings Bank, was trustee under a mortgage trust deed on the land and the building in which the apartment is located, and that plaintiff, as such trustee, took possession of the premises in question in August, 1933. Whether such possession was obtained by order of court, or otherwise, the record does not disclose. On July 26th, 1933, defendant moved into the apartment without the consent of plaintiff, and without stating to plaintiff his intention to do so. On July 26th, 1933, defendant was served by plaintiff with a demand for immediate possession of the premises. Subsequently, the action in question was begun, the complaint filed in which it is alleged that defendant unlawfully withheld the possession of the premises, and on September 15th, 1933, after a hearing, the court found the defendant not guilty. Following this finding, the judgment for costs was entered against plaintiff, from which judgment this appeal is being prosecuted.

By what right or claim of right defendant holds possession of the premises, is not clear. The abstract recites that "defendant is reported to be the owner of the building and moved in five weeks before the trial." The trust deed referred to is not in the record, and the record is vague as to whether defendant is or is not the owner

of any equity of redemption in the premises, although the court on the hearing seems to have proceeded on the theory that he is such owner. The only testimony on this question is that elicited from a witness for plaintiff. On cross-examination this witness testified in effect that he was informed that defendant owned an interest in the equity of redemption, but that he had no actual knowledge in regard thereto.

None of the cases cited by defendant is in point. In each of these cases, the question presented to the court was as to the right of a trustee under the terms of a trust deed to obtain possession of mortgaged property after default, and how such possession might be obtained - whether by an action in ejectment, an action in forcible entry and detainer, or otherwise. Here no such question is involved. In the instant case, in so far as the record indicates, the plaintiff was in lawful possession when defendant moved in without its consent and without any established right.

An Act in regard to forcible entry and detainer, Cahill's Illinois Revised Statutes, 1933, Chapter 57, Section 1, provides, "that no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." Section 2 of this Act provides "that the person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided: First - When a forcible entry is made thereon."

In Hammond v. Doty, 184 Ill. 246, the court said:

"In an action of forcible entry and detainer only the immediate right of possession is involved, and the title to the premises cannot be called in question. *** The material question for the jury to determine was, whether, in fact, at the time alleged, the appellee was in the actual, peaceable possession of the premises in question, and whether the defendants below, the appellants here, entered upon such possession against the will of the appellee, the plaintiff below, and retained such possession. *** Under our Statute of Forcible Entry and Detainer actual violence, amounting to a breach of the peace, is not necessary in any case. Any entry is forcible, within the meaning of the law, that is made against the will of the occupant."

of any equity of redemption in the premises, although the court on the hearing seems to have proceeded on the theory that he is such owner. The only testimony on this question is that elicited from a witness for plaintiff. On cross-examination this witness testified in effect that he was informed that defendant owned an interest in the equity of redemption, but that he had no actual knowledge in regard thereto. None of the cases cited by defendant is in point. In each of these cases, the question presented to the court was as to the right of a trustee under the terms of a trust deed to obtain possession of mortgaged property after default, and how such possession might be obtained - whether by an action in ejectment, an action in forcible entry and detainer, or otherwise. Here no such question is involved. In the instant case, in so far as the record indicates, the plaintiff was in lawful possession when defendant moved in without its consent and without any established right.

An Act in regard to forcible entry and detainer, Chapter 1, provides "that no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." Section 2 of this Act provides "that the person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided: First - When a forcible entry is made thereon."

It is further provided, Chapter 1, Section 3, that the court shall "in an action of forcible entry and detainer only the immediate right of possession is involved, and the title to the premises cannot be called in question." The court further states that the question for the jury to determine was, whether, at the time alleged, the appellee was in the actual possession of the premises in question, and whether the defendant's entry was forcible or peaceable. The court further states that the plaintiff's possession against the will of the appellee, the plaintiff's claim, was retained with possession. Under our statute of forcible entry and detainer, actual violence, according to a breach of the peace, is not necessary in any case. Any entry is forcible, within the meaning of the law, that is made against the will of the occupant.

We also call attention to the case of Groff v. Mallinger,

18 Ill. 200, where the Supreme Court said:

"To constitute forcible entry and detainer, under our statute, it is not essential that the entry be made with strong hand or be accompanied with acts of actual force or violence, either against person or property. If one enters into the possessions of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible in legal contemplation."

From the record filed here, as heretofore stated, it appears that the plaintiff was in the lawful and legal possession of the premises in question, and that defendant forcibly entered into such premises without any disclosed right to do so. The plaintiff had the legal right to prosecute the action brought here, and we are of the opinion that the court was in error in its finding and judgment. The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

We also call attention to the case of Griff v. Holliman.

18 Ill. 200, where the Supreme Court said:

"To constitute forcible entry and detainer, under our statute, it is not essential that the entry be made with strong arms or be accompanied with acts of actual force or violence, which against person or property. If one enters into the possession of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible in legal contemplation."

From the record filed here, as heretofore stated, it appears that the plaintiff was in the lawful and legal possession of the premises in question, and that defendant forcibly entered into such premises without any disclosed right to do so. The plaintiff had the legal right to prosecute the action brought here, and we are of the opinion that the court was in error in its finding and judgment. The judgment is, therefore, reversed and the cause remanded.

REVEREND AND HONORABLE,

WILLIAM F. AND WILSON, J. COOK.

37318

IDA J. HODGE,

Appellee,

v.

EVENING AMERICAN PUBLISHING
COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

279 I.A. 623²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks the reversal of a judgment against it for \$10,000.00 and costs of suit. The action is based upon a charge that plaintiff was injured as a result of the negligence of defendant's servants in the operation and management of a motor truck owned by defendant. It is admitted that defendant owned the truck and it is not denied ^{here} that plaintiff was injured as a result of its negligent operation. There is no claim that the damages are excessive. The ground for reversal urged here is that a young man named Walter Slupak, who was operating the truck when plaintiff was injured, was without authority, express or implied, to do so. At the time of the accident, which happened on February 3rd, 1932, the truck was in use by defendant for the delivery of its papers to various news stands located in the downtown or loop district of Chicago. The accident happened on the north side of Washington street, a short distance west of State street, in the city of Chicago.

Walter E. Grams, produced as a witness for the plaintiff, testified that he was a retired attorney-at-law, having previously been city prosecutor for the city of Chicago; that he witnessed the accident in question. He further testified that at the time and place of the accident he "was waiting there to buy the last edition of the Chicago American, which arrives there from 6:15 to 6:30 every evening. The accident happened at about 6:30. While I was standing there that evening I saw a truck pull up there and stop eight or ten

27316

IDA J. HODGE,

APPELLANT

DEFENDANT

CHARGE

VERDICT

REMARKS

REMARKS

REMARKS

27316

MR. JUSTICE WILL DELIVER THE OPINION OF THE COURT.

By this appeal, defendant seeks the reversal of a judgment against it for \$10,000.00 and costs of suit. The action is based

upon a charge that plaintiff was injured as a result of the negligence of defendant's servants in the operation and management of a motor truck owned by defendant. It is admitted that defendant owned the truck and it is not denied that plaintiff was injured as a result of

here

its negligent operation. There is no claim that the damages are excessive. The ground for reversal urged here is that a young man named Walter Simpson, who was operating the truck when plaintiff was injured, was without authority, express or implied, to do so. At the time of the accident, which happened on February 25, 1933,

the truck was in use by defendant for the delivery of its papers to various news stands located in the downtown or loop district of Chicago. The accident happened on the north side of Washington street, a short distance west of State street, in the city of Chicago.

Walter E. Gurnea, produced as a witness for the plaintiff,

testified that he was a retired attorney-at-law, having previously been city prosecutor for the city of Chicago; that he witnessed the

accident in question. He further testified that at the time and place of the accident he "was waiting there to buy the last edition of the Chicago American, which arrives there from 6:15 to 6:30 every evening. The accident happened at about 6:30. While I was standing there that evening I saw a truck pull up there and stop right or ten

feet west of the State street cross walk on the north side of the street. It was a Chevrolet truck with a covered top, and 'Evening American' was painted on the side. *** The regular driver was Jimmy Huggett, and the other person on the truck was Walter Slupak, a boy of fifteen or sixteen. For two or three years it was my habit to go to that corner and buy a copy of that particular edition of the paper. I saw Huggett and Walter Slupak every day on that truck, or a horse and wagon, and I saw Walter Slupak on the truck almost a year, although Huggett drove the truck longer than that. *** That night Huggett and Slupak drove up, stopped at the curb, and the news man, Alterie, came over to the truck. Huggett counted out the papers, gave them to Walter Slupak and Walter handed them to Alterie. Huggett jumped out of the truck and ran toward Dearborn street, and before he left he said to Walter Slupak, 'Now, be sure and watch this truck and keep those kids away from here.' *** When Huggett left the truck Walter Slupak was on the seat of the truck. When Huggett drove up he stopped the motor. After Huggett left, Walter moved over into the driver's seat behind the wheel, and two or three minutes after Huggett left my attention was attracted by the motor starting, and the truck started backing up. At that time the boy was in the driver's seat holding the wheel. As soon as I heard the truck start I looked up and saw the truck moving backwards and back up against the curb. *** The truck backed up against the curb, climbed the curb and pushed this news stand, in front of which was a woman buying a paper, whose name I later found out was Fisher; it pushed the news stand to one side, knocked the woman down, *** and passed over the woman. It backed up against the corner window where I was standing, broke it, then backed onto the State street sidewalk, curved around and backed up against the building. All this occurred in about half a minute. After the truck climbed the curb onto the sidewalk, it seemed to gain momentum. I saw Mrs. Hodge

feet west of the State street cross walk on the north side of the street. It was a Chevrolet truck with a covered top, and 'Evening American' was painted on the side. The regular driver was Jimmy Huggett, and the other person on the truck was Walter Blupak, a boy of fifteen or sixteen. For two or three years it was my habit to go to that corner and buy a copy of that particular edition of the paper. I saw Huggett and Walter Blupak every day on that truck, on a horse and wagon, and I saw Walter Blupak on the truck almost a year, although Huggett drove the truck longer than that. "That night Huggett and Blupak drove up, stopped at the curb, and the news man, Alister, came over to the truck. Huggett counted out the papers, gave them to Walter Blupak and Walter handed them to Alister. Huggett jumped out of the truck and ran toward Dearborn street, and before he left he said to Walter Blupak, 'Now, be sure and wait this time and keep those kids away from here.' "When Huggett left the truck called Blupak and on the seat of the truck, then Huggett drove up he stopped the motor. After Huggett left, Alister moved over into the driver's seat behind the wheel, and two or three minutes after Huggett left my attention was attracted by the motor starting, and the truck started backing up. At that time the boy was in the driver's seat holding the wheel. As soon as I heard the truck start I looked up and saw the truck moving backwards and back up against the curb. "The truck backed up against the curb, climbed the curb and crashed this news stand, in front of which was a woman buying a paper, whose name I later found out was Fisher; it pushed the news stand to one side, knocked the woman down, "and passed over the woman. It backed up against the corner window where I was standing, broke it, then backed onto the State street sidewalk, curved around and backed up against the building. All this occurred in about half a minute. After the truck climbed the curb onto the sidewalk, it seemed to gain momentum. I saw Mrs. Noddy

after the truck stopped, on the State street sidewalk about twenty five feet west of the building line at Washington street. She was lying down. I picked up Mrs. Fisher and carried her to a Yellow Cab and then I saw Mrs. Hodge lying on the sidewalk and someone picked her up and put her in a Checker cab. I had never seen her before the accident. *** After the accident, I took Alterie to the Iroquois Hospital and there I saw Mrs. Hodge being carried on the stretcher out of the hospital and being taken to some other hospital. Prior to the accident, I had seen these men on the truck many times bringing this particular edition of the paper about the same time every evening. Several times I heard the driver tell Walter Slupak to keep the kids away in the driver's absence; Huggett would collect from the different stands around and I saw Walter on several occasions start the motor. *** I had seen Walter come up with the regular driver on the truck, and I had seen Slupak stay in charge of ^{the} truck during Huggetts' absence. When the driver left the truck standing there, there were five or six boys there that hung around every night. They would jump up and down on the running board, reach in and monkey around the levers and push the truck backwards and forwards, playing around. I saw them a number of times, nearly every day."

Rocco Alterie, a witness for plaintiff, testified as follows: "My name is Rocco Alterie; I live at 561 Bunker street, and am a news dealer, working for my father, who has the news stand at State and Washington street. He has been at that corner fourteen or fifteen years, and has two stands there, one at Washing^{ton}/street and one at State street. I had been working for my father nine or ten years before February, 1932; I am nineteen years old. I knew a truck driver for the Chicago Evening American named Marvin Huggett, and I know Walter Slupak. I had known Huggett about seven months, the time he had been on the route; and I had known Slupak about the same time. He began with Huggett. During this period Huggett had a horse

after the truck stopped, on the State street sidewalk about twenty
five feet west of the building line at Washington street. She was
lying down. I picked up Mrs. Fisher and carried her to a Yellow Cab
and then I saw Mrs. Dodge lying on the sidewalk and someone picked
her up and put her in a checker cab. I had never seen her before
the accident. After the accident, I took her to the hospital
hospital and there I saw her. Being carried on the stretcher
out of the hospital and being taken to some other hospital. After
to the accident, I had seen these men on the truck many times
during this particular edition of the paper about the same time
every evening. Several times I heard the driver tell Walter Bishop
to keep his left eye in the driver's window; I heard him say
from the different stands around and I saw him at several occasions
start the motor. I had seen Walter come up with the regular driver
on the truck, and I had seen him stay in charge of the truck during
Huggett's absence. When the driver left the truck standing there,
these were the boys that had many times every night. They
would turn up and down on the running board, stand in and away
around the front and push the truck backwards and forwards, playing
around. I saw them a number of times, nearly every day."
James Alford, a witness for plaintiff, testified as
follows: "My name is James Alford; I live at 881 Center street, and
am a news dealer, working for my father, who has the news stand at
State and Washington street. He has been at that corner fourteen or
fifteen years, and has two stands there, one at Washington street and
one at State street. I had been working for my father nine or ten
years before February, 1935; I am nineteen years old. I know a truck
driver for the Chicago Evening American named Marvin Huggett, and
I know Walter Bishop. I had known Huggett about seven months, the
time he had been on the route; and I had known Bishop about the same
time. He began with Huggett. During this period Huggett had a license

and wagon and for the last three months he had a truck. *** Slupak used to get down with the truck about 3:30, his first trip, and would stay until ^{about} 6:30, the last trip, and during that time the driver would tell him how many papers to give to the news dealers; once in a while about 6:30, when Huggett went up Dearborn street, Walter would cross to the southeast corner and collect for the day's papers. When I saw him give out papers from the truck, he was on the front seat at the time and he was in the truck. I saw him ride up on the truck with the driver every day he was there, during the seven months he was employed by Huggett. I saw him on the truck when Huggett went away, and on those occasions he would be either in the driver's seat or on the side. Some times he would get in the truck and start the car and warm it up, and once Huggett was coming down Washington street from Dearborn street and the truck was parked on Washington near State street at the corner, and he pulled up about twenty feet and just moved over and Huggett got in and drove away. I saw that myself. I noticed him start the truck or warm it up for the driver when he was away or coming back quite a few times. A number of boys used to come around that corner at that time, but I don't remember whether Huggett ever told Slupak to keep the boys away from the truck. I have seen Walter chase other boys away from the truck quite a few times. When the driver came back I saw the boy open up the ignition step on the starter and start the truck. Once he pulled up 20 or 30 feet and moved over in the seat and let the driver sit down. He rode away with the driver."

Charles Volker, a witness for defendant, testified as follows: "I am employed by the Chicago Evening American in the capacity of branch manager. *** About two years ago I hired a boy by the name of Walter Slupak. He was used to sell papers throughout the loop, and also to distribute papers from the truck to other boys throughout the loop on the same street the driver had. *** He was

and wagon and for the last three months he had a truck. *** Simpson
wants to get down with the truck about 3:30, the first trip, and
would stay until 5:30, the last trip, and during that time the driver
would sell him how many papers to give to the news dealer; once in
a while about 3:30, when Huggett went up Dearborn street, later
would cross to the southwest corner and collect for the day's papers.
When I saw him give out papers from the truck, he was on the front
seat at the time and he was in the truck. I saw him ride up on the
truck with the driver every day he was there, during the seven months
he was employed by Huggett. I saw him on the truck when Huggett went
away, and on those occasions he would be driver in the driver's seat
or on the side. Some times he would get in the truck and start the
car and ride it up, and once Huggett was coming down Washington street
from Dearborn street and the truck was parked on Washington near
State street at the corner, and he pulled up about twenty feet and
just moved over and Huggett got in and drove away. I saw that myself.
I noticed him start the truck or ride it up for the driver when he
was away or coming back quite a few times. A number of boys used
to come around that corner at that time, but I don't remember whether
Huggett ever told Simpson to keep the boys away from the truck. I
have seen Walter chase other boys away from the truck quite a few
times. When the driver came back I saw the boy open up the ignition
step on the starter and start the truck. Once he pulled up 30 or
30 feet and moved over in the seat and let the driver sit down. He
rode away with the driver.

Charles Volker, a witness for defendant, testified as
follows: "I am employed by the Chicago Evening American in the
capacity of branch manager. *** About two years ago I hired a boy
by the name of Walter Simpson. He was used to sell papers throughout
the loop, and also to distribute papers from the truck to other boys
throughout the loop on the news street the driver had. *** He was

not allowed to be on the truck with the driver. He had nothing to do with the truck. *** I was not at State and Washington streets the night the accident happened."

Marvin R. Huggett, the driver of the truck, testified as follows: "I have been employed by the Evening American as a driver, and on February 3rd, 1932, I was so employed. *** Mr. Volker sent me a boy to be stationed at Washington and State streets to take care of the boys and save me running and doing the work. *** I never saw him drive a car. I ordered him to keep away from the truck. *** at about 6:20 that evening I parked the truck on Washington street about thirty feet west of State street. When I left, the motor was not running. Walter (meaning Slupak) was not there. *** I have known this boy Walter Slupak, since Mr. Volker introduced him to me. *** I discharged him two or three times. *** I thought I had the right to discharge him and I did discharge him on several occasions. *** I locked the truck, took out the key and threw it beneath the speedometer cable. The key was fastened to a chain which was fastened to the truck. *** I never told Walter where it was, but he must have seen me put it there. He knew where to find it."

Carl M. Guelzo, a witness for the defendant, gave the following testimony: "I am employed by the Chicago Evening American, I was manager of city circulation, and it was my duty to run the entire circulation department, hiring drivers, and doing everything pertaining to circulation and delivery. I am the only man who hires drivers for the American. Charles Volker works for me. *** I have a driver named Marvin R. Huggett. *** I assigned him to that particular truck and route. The instructions I gave Huggett are that no one is allowed to drive that truck but himself. He is strictly responsible for the truck at all times; no one to be riding on the truck but himself. A boy named Walter Slupak was working for the company in February, 1932. *** On February 3rd, 1932, he was

not allowed to be on the truck with the driver. He had nothing to do with the truck. *** I was not at State and Washington streets the night the accident happened."

Marvin R. Huggett, the driver of the truck, testified as follows: "I have been employed by the Evening American as a driver, and on February 3rd, 1932, I was so employed. *** Mr. Volker sent me a boy to be stationed at Washington and State streets to take care of the boys and have me running and doing the work. *** I never saw him drive a car. I ordered him to keep away from the truck. ***

As almost 6:30 that evening I parked the truck on Washington street about thirty feet west of State street. When I left, the motor was not running. Walter (Walter Singer) was not there. *** I have known this boy Walter Singer, since Mr. Volker introduced him to me. *** I discharged him two or three times. *** I thought I had the right to discharge him and I did discharge him on several occasions. *** I looked the truck, took out the key and threw it beneath the speedometer cable. The key was fastened to a chain which was fastened to the truck. *** I never told Walter where it was, but he must have seen me put it there. He knew where it was."

Carl M. Guelino, a witness for the defendant, gave the following testimony: "I am employed by the Evening American, I was manager of city circulation, and it was my duty to run the entire circulation department, hiring drivers, and doing everything pertaining to circulation and delivery. I am the only man who hires drivers for the American. Charles Volker works for me. *** I have a driver named Marvin R. Huggett. *** I assigned him to that particular truck and route. The instructions I gave Huggett are that no one is allowed to drive that truck but himself. He is

entirely responsible for the truck at all times; no one to be riding on the truck but himself. A boy named Walter Singer was working for the company in February, 1932. On February 3rd, 1932, he was

stationed at Washington and State streets." This witness was asked the following question, and gave the following answer:

"Q. Did you hire Walter Slupak or didn't you?"

"A. Someone hired him, but he had to come to me for my O.K."

This witness further testified that "Charles Volker works for me *** and did not actually hire Walter Slupak. He (meaning Slupak) had been discharged several times by Huggett." *** On cross-examination this witness testified that "This morning they asked me who hired the truck drivers; they did not tell me that Huggett had testified that he had discharged Walter on two or three occasions prior to the accident and that Mr. Volker had put him back to work, and I did not know anything about that, and if it occurred, it was without my knowledge or consent. If Huggett discharged the boy several times and Mr. Volker put him back to work and he continued to work for the American after that, the man who did it apparently had authority to. *** I knew that one of the duties of the driver was to leave the truck at State and Washington streets, and go over to Dearborn Street to make collections, and I knew that while he was away, the truck was allowed to stand in the street unattended."

Slupak was not called as a witness. The record is confusing as to who employed him. As stated, Volker, the branch manager of defendant company, testified that he had hired Slupak, but the circulation manager, who was Volker's superior, testified that this branch manager, Volker, did not do so, but that some^{one} in authority did.

From the testimony in the case, it seems evident^{however,} that Slupak was employed by defendant, and that Huggett was placed by defendant in entire charge of the operation of this truck, a dangerous agency, and of Slupak, in connection with the work to be done in connection therewith. We are not impressed with defendant's suggestion that Slupak was "on a frolic of his own,"

stationed at Washington and State streets." This witness was

asked the following question, and gave the following answer:

"Did you hire Walter Slupak or didn't you?"

"A. Someone hired him, but he had to come to me for

my O.K."

This witness further testified that "Charles Volker works for me" and did not actually hire Walter Slupak. He (meaning Slupak) had

been discharged several times by Huggett." *** On cross-examination

this witness testified that "This morning they asked me who hired

the truck drivers; they did not tell me that Huggett had testified

that he had discharged Walter on two or three occasions prior to

the accident and that Mr. Volker had put him back to work, and I

did not know anything about that, and if it occurred, it was without

my knowledge or consent. If Huggett discharged the boy several

times and Mr. Volker put him back to work and he continued to work

for the American river that, the man who did it apparently had

authority to. *** I know that one of the duties of the driver was

to leave the truck at State and Washington streets, and go over to

Washington street to wait for passengers, and I know that while he was

away, the truck was allowed to stand in the street unattended."

Slupak was not called as a witness. The record is com-

plete as to the testimony of the witness, Volker, the driver

manager of defendant company, testified that he had hired Slupak,

but the witness manager, who was Volker's superior, testified

that this witness manager, Volker, did not do so, but that some one

else did. However,

from the testimony in the case, it seems without doubt

Slupak was employed by defendant, and that Huggett was placed by

defendant in entire charge of the operation of this truck, a

dangerous agency, and of Slupak, in connection with the work to

be done in connection herewith. We are not impressed with

as suggested by counsel. On the contrary, from the evidence before them, the jury could reasonably find that when Slupak started the motor, on the occasion in question, as it is admitted he did, he was apparently doing what he considered to be a part of his work. He was doing what the witnesses testify Huggett had previously permitted or caused him to do. If Huggett habitually permitted Slupak to start the motor running, he should have anticipated that he might start the truck going, as it is testified he did, with Huggett's acquiescence, on at least one previous occasion.

In Chicago & Alton Railroad Company v. May, 108 Ill. 288, an action was brought against the railroad company by the administratrix of the estate of one Christian May to recover for what was alleged to be negligence on the part of the railroad company, which resulted in the death of the decedent. In that case, the deceased, at the time of his death, was one of a number of hands in the employ of the railroad company in the lumber yard connected with its workshops at Bloomington, under the immediate control and charge of one Fricke, who was also in the employ of the railroad company as foreman of the lumber yard. Immediately before the death of May, Fricke, together with a number of persons, including the deceased, was engaged in removing lumber from the yard to the car shops. The lumber in question consisted of heavy planks. For the purpose of removal, it had been placed upon a small car which was used in handling lumber in the yard and in removing it to the shops. This car loaded with lumber stood on a track near the shops, and on the same track stood a large box car which had to be moved before the lumber car could be run down to the shops. To get this latter car out of the way, it was necessary that both cars should be pushed some distance beyond a switch so that the box car could be switched off to one side in order that the small car loaded with lumber might pass into the shops. To accomplish this purpose, Fricke ordered the

men to push the box car against the small car, which action shoved the lumber so far over on the small car thus loaded that it would throw the lumber out. The two cars were pushed in this manner for a distance when Fricke ordered the men to leave the small car and push the large one out of the way. Some of the men went to the end of the planks as they projected from the small car and held them up, while the others pushed the large car as directed by Fricke, and as soon as the cars were separated some of the men, including the deceased, went between the cars to push. Fricke was told that if the men proceeded as they were doing, the planks would fall and some one would get hurt. He insisted that they proceed with his direction. The order was obeyed, the lumber fell, and as a result, the decedent was killed. The question arose there as to whether or not the conduct of Fricke, who was in direct control of these men, in directing them to do what they did, was binding on the railroad company. The court said:

"When a railroad company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company, and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequence."

To the same effect are City of La Salle v. Kostka, 190 Ill. 130, Wenona Coal Co. v. Holmquist, 153 Ill. 581, M. & O. R. R. Co. v. Godfrey, 155 Ill. 78, Fraser & Chalmers v. Schroeder, 163 Ill. 459, Worthey v. C. C. C. & St. L. Ry. Co., 251 Ill. App. 585.

We are of the opinion that the evidence indicates that

although Huggett had an immediate superior standing between him and the defendant company, still he was permitted by those in authority to have such power and control over the truck, and the work to be done in connection therewith, and over Slupak in this regard, that in acquiescing in Slupak's acts in connection with the truck, he made them the acts of the defendant company. It is, therefore, our conclusion that the negligence of Slupak in the operation of this truck, became the negligence of the company and that defendant is liable for the consequences. The jury was evidently of this opinion, and we do not feel that under the circumstances the verdict and judgment should be disturbed. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

Although Knappe had an immediate superior standing between him
and the defendant company, still he was prevented by reason of
authority to have such power and control over the truck, and the
work to be done in connection therewith, and over Knappe in this
regard, that in appointing as Knappe's agent in connection with
the truck, he made that the work of the defendant company. It is
therefore, not considered that the negligence of Knappe as the
operator of this truck, became the negligence of the company
and that therefore he is liable for the consequences. The jury was
evidently of this opinion, and we do not feel that under the
circumstances the verdict and judgment should be dissolved. There-
fore, the judgment is affirmed.

AFFIRMED.

WHEEL, J. J. and FLEMMING, J. JOSEPH.

37333

ELIZABETH MOSS,

Appellee,

v.

FEDERAL LIFE INSURANCE COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

279 I.A. 623³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Circuit Court of Cook County against it for \$2,000.00 upon the verdict of a jury in a suit brought by plaintiff against defendant, based on an insurance policy issued on the life of plaintiff's deceased husband. The declaration filed in the case consisted of but one count. The insurance policy, is set out verbatim in the declaration. The death of the insured is alleged and plaintiff claims the indemnity provided by the policy. Defendant filed a plea of the general issue and two special pleas, one of a tender to plaintiff of the amount of the premiums paid, and the other charging that the insured had procured the policy by making false answers to questions contained in the application for insurance with regard to the condition of his health prior to and at the time of making application therefor, and that he made false statements with respect to his use of alcoholic beverages, and in regard to the question of whether or not he had other insurance on his life at the time of the making of this application. A photostatic copy of the original application containing the questions and answers put to and made by the defendant is attached to and made a part of the insurance contract. The record does not indicate that a medical examination was had of the insured. The policy was evidently issued on the strength of the answers made to the questions. The questions and answers to which the court's particular attention is called, are as follows:

279 I.A. 623

... THE COURT ...
... This is an appeal by defendant from a judgment of the ...
... Court of Cook County against it for \$5,000.00 upon the ...
... of a jury in a suit brought by plaintiff against defendant ...
... based on an insurance policy issued on the life of plaintiff's ...
... deceased husband. The declaration filed in the case consisted of but ...
... one count. The insurance policy, as set out verbatim in the declara- ...
... tion. The death of the insured is alleged and plaintiff claims the ...
... indemnity provided by the policy. Defendant filed a plea of the ...
... general issue and two special pleas, one of a tender to plaintiff of ...
... the amount of the premium paid, and the other asserting that the in- ...
... surance had been issued and policy by means of which the plaintiff ...
... contained in the application for insurance with regard to the con- ...
... dition of his health prior to and at the time of making application ...
... therefor, and that he made false statements with respect to his use ...
... of alcoholic beverages, and in regard to the question of whether or ...
... not he had other insurance on his life at the time of the making of ...
... this application. A photostatic copy of the original application ...
... containing the answers and questions set in two parts of the ...
... is returned to and with a copy of the insurance contract. The contract ...
... does not indicate that a medical examination was had of the insured. ...
... The policy was evidently issued on the strength of the answers made ...
... to the questions. The questions and answers to which the court's ...
... particular attention is called, are as follows:

"Question 21 (a) Have you any ailments, diseases or disorders? If any, state details. Answer: None. (b) Have you ever been sick or disabled? Answer: No. Question: If so, state date of last disability. Month --- Year --- (c) of what disease or disability? Answer: Never serious. (d) Name and address of physician consulted. Answer: None.

Question 22. Have you any physical or mental defect or infirmity? If so, what? Answer: None.

Question 23. Have there ever been any cases of insanity, tuberculosis, epilepsy or suicide in your family? If so, state details. Answer: No.

Question 24. Have you ever had any of the following diseases or disabilities? If so, state details below. If 'none' state below. Appendicitis? Asthma? Bronchitis? Cancer or Tumor? Discharge from ear? Epilepsy or Convulsions? Chronic Coughs? Consumption? Difficulty in urinating? Dropsy or Heart Disease? Gall Stones? Gastric or Duodenal Ulcer? Gout? Gonorrhoea? Lumps or Swellings? Loss of consciousness? Pleurisy? Pneumonia? Rheumatism? Rupture? Spitting Blood? Spinal Disease? Syphilis? Severe headaches? High blood pressure? Albumin or Sugar in urine? Accidents or Injuries or Operations? Answer: None.

Question 25. Have you ever sought medical or surgical advice or undergone an operation? If so, state details including dates. Answer: No.

Question 26. Have you any impairment of sight, speech or hearing? If so, state details. Answer: No.

Question 27. State name and address of any physician you have consulted during last five years. Answer: None.

Question 28. Have we your permission to refer to such physician for complete information? Answer: Yes.

Question 29. If in the opinion of the company medical examination is required, do you agree to submit to such examination? Answer: Yes.

Question 30. Are you now in sound health? Answer: Yes.

Question 31. (a) Do you use or have you ever used whiskey, wine, beer, or other alcoholic beverages? (b) If so, to what extent? Answer: No.

Question 32. Have you ever used them to excess or intoxication? If so, state details. Answer: No.

Question 45. Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life? If none, please state 'None.' (If you have now or have had any disease named in 24, state full particulars below.) Answer: None."

Attached to and a part of the application for insurance of which the questions and answers are a part, as hereinbefore stated, is the following: "I hereby certify that before signing, I read each and all of the questions, answers, statements and agreements above set forth, and I further certify that my answer to each of the above questions has been correctly written herein. Signed at Chicago, Illinois, State of Illinois, this 2nd day of February, 1932. William F. Moss (Signature of applicant in full) M. J. Pankey (Agent actually soliciting application)." The policy of which the questions and answers are a part, contains the following provision:

"This policy and application herefor, a copy of which is hereto attached, shall constitute the entire contract between the parties and all statements made in the application will be deemed representations and not warranties, and no such statement will avoid the policy or be used in defense to a claim thereunder unless it is contained in a written application and a copy of such application be endorsed upon or attached to the policy when issued."

On October 23rd, 1933, the case was called for trial and a jury impaneled, and on October 24th, 1933, after plaintiff had submitted her evidence, plaintiff asked for and was given leave by the court to file a similitur to the first of defendant's pleas and a general replication to the other two pleas. The general replication merely joins issue on defendant's special plea and concludes to the country.

Plaintiff testified in substance that she is the widow of the insured; that they were married in 1907; that the insured had worked as an automobile mechanic for eight years, days and nights; that some weeks he worked 108 hours, other weeks 98, 97 and 46 hours, and that he never lost a day; that on February 2nd, 1932, when an agent of the Federal Life Insurance Company was at her home, her daughter, son and herself were the only ones present, and that they discussed matters of insurance; that Mr. Pankey the agent of defendant, talked to her husband and that he answered the questions; that Pankey did not really ask all of the questions, he just went on and wrote

is stated in the affidavit for the purpose of showing the
questions and answers and the statements made in the
following: "I hereby certify that before signing, I read each and
all of the questions, answers, statements and arguments above set
forth, and I further certify that my answer to each of the above
questions was given voluntarily without coercion, threats or promises."

Illinois, State of Illinois, this 2nd day of February, 1933. William
P. Howe (Signature of Applicant in full) M. J. Donkey (Agent actually
collecting application). "The policy of which the questions and
answers are a part, contains the following provision:

"This policy and application hereon, a copy of which is
being furnished to the insured, shall constitute the entire contract between
the parties and all statements made in the application will
be deemed representations and not warranties, and no such
statement will avoid the policy or be used in defense to a
claim thereunder unless it is contained in a written appli-
cation and a copy of such application be entered upon or
attached to the policy when issued."

On October 23rd, 1932, the case was called for trial and a jury
impaneled, and on October 24th, 1932, after plaintiff had submitted
his evidence, plaintiff asked for and was given leave by the court
to file a stipulation to the first of defendant's pleas and a general
verdict for the sum of \$1000. The general verdict was
given in favor of defendant's special plea and concluded to the contrary.
Plaintiff testified in substance that she is the widow
of the insured; that they were married in 1907; that the insured had
worked as an automobile mechanic for eight years, days and nights;
that some weeks he worked 108 hours, other weeks 92, 97 and 48 hours;
and that he never lost a day; that on February 2nd, 1932, when an
agent of the Federal Life Insurance Company was in the house, the
insured, and plaintiff with the said agent present, and that the
insured advised of his intention to make a will, and that he
called to his children and that he answered the questions; that when
did not recall all of the questions, he just went on and wrote

down; that Pankey asked her husband if he had ever been sick with any ailments; that her husband said he was never sick outside of a cold and that it had been some time since he had had a cold, that he had been sick, but he did not recollect when, but it was some time ago; that Pankey asked her husband if he had ever been treated by a doctor during the past five years, and that the insured said that he had his family physicians whose names were Dr. Enright and Dr. Fielding; that he asked her husband if he ever drank beer, wine or other intoxicating liquors, and her husband said, "Does a fish swim?" that he did not deny that he took a drink the same as any other man. Pankey asked him if he might refer to the family physician, and her husband said, "Yes", that her husband did not write any of these answers, he just signed his name to the document; that her husband received the insurance policy on the 9th day of February, 1932, and that it is in the same condition now as it was when he received it; that from the 2nd day of February, 1933, up until the 21st day of January, 1933, her husband worked every day, including Sundays; that he went on trips and did not come home for four or five nights; that he worked 12 to 14 hours a day; that from the 23rd of February, 1932, until his death, he did not lose any days from his work; that he went out on a job, caught cold and died on the 21st of January, 1933.

Priscilla Backhoff, a daughter of the insured and the plaintiff, testified in substance that she was at her mother's home on the afternoon and evening of February 2nd, 1932, and that her brother, father and mother were also present, and that for a short time her husband was there; that Mr. Pankey, an insurance man, was there between 6 and 7 o'clock in the evening, and that she heard a conversation between Pankey and her father and mother concerning insurance; that she heard the questions asked of her father by the agent, and her father's answers to these questions; that her father said he had been sick about two years previously with a cold, and that he had

down; that Kennedy asked her husband if he had ever been sick with any ailments; that her husband said he was never sick outside of a cold and that it had been some time since he had had a cold, that he had been sick, but he did not recollect when, but it was some time ago; that Kennedy asked her husband if he had ever been treated by a doctor during the past five years, and that the insured said that he had his family physician whose names were Dr. Wright and Dr. Williams; that he asked her husband if he ever drank beer, wine or other intoxicating liquors, and her husband said, "Does a fish eat?" that he did not deny that he took a drink the same as any other man. Kennedy asked him if he might refer to the family physician and her husband said, "Yes", that her husband did not write any of these letters, he just signed his name to the document; that her husband received the document calling on him on the 24th of February, 1932, and that it is in the same condition now as it was when he received it; that from the first day of February, 1932, up until the first day of January, 1933, her husband worked every day, including Sundays; that he went on trips and did not come home for four or five nights; that he worked 12 to 14 hours a day; that from the 22nd of February, 1932, until his death, he did not lose any days from his work; that he went out on a job, caught cold and died on the 21st of January, 1933. Elizabeth Ascholtz, a daughter of the insured and the plaintiff, testified in substance that she was at her mother's home on the afternoon and evening of February 2nd, 1932, and that her husband, Edward Ascholtz, was also present, and that for a short time before 6 and 7 o'clock in the evening, and that she heard a conversation between a man and her father and mother concerning insurance; that she heard the questions asked of her father by the agent, and her father's answers to these questions; that her father said he had not been sick about two years previously with a cold, and that he had

seen Doctor Enright and Doctor Fielding; that Pankey wrote down the answers and that her father did not do so; that Pankey was talking and writing at the same time; that she heard Pankey ask her father if he used intoxicating beverages, and that her father answered, "Does a fish swim?" that she did not hear Pankey ask her father if he had ever been intoxicated, and that she did not remember any further questions being asked; that Pankey did not read the document to her father, but that her father looked it over, and as she remembers, the agent picked the document up and asked her father to sign his name, which he did; that her father worked almost day and night all his life, and never lost any work.

The testimony of these witnesses was objected to by counsel for defendant and the objections overruled, and motions made to strike it out, which motions were denied.

Elizabeth Moss was called by the defendant and testified that the insured made application in his life time to the Metropolitan Life Insurance Company after the issuance of the Federal Life Insurance policy, on or about August, 1932. She was asked whether she had completed proofs of loss on the policy of insurance issued by the Metropolitan Life Insurance Company. This question was objected to by plaintiff, and the objection was sustained by the court.

Charles Sulzer, assistant manager - supervisor of the Metropolitan Life Insurance Company, testified that the Metropolitan Life Insurance Company paid the amount of an insurance policy to the beneficiary, plaintiff in this case. The application was offered in evidence by the defendant, objection thereto was made and the objection sustained by the court.

Richard Koehler, a witness for defendant, testified that in December, 1932, he was connected with the Holy Cross Hospital as an externe; that he knew the insured during his life time and had talked with him; that he took the history of the insured when he was

seen Doctor Knight and Doctor Fleming; that Penney wrote down the answers and that her father did not do so; that Penney was talking and writing at the same time; that the second Penney ask her father if he was interested in anything, and that her father answered, "Does a fish swim?" that she did not hear Penney ask her father if he had ever been intoxicated, and that she did not remember any further questions being asked; that Penney did not read the document to her father, but that her father looked it over, and as she remembers the first check the document up and down but failed to sign his name, which he did; that her father worked almost day and night all his life, and never lost any work.

The testimony of these witnesses was objected to by counsel for defendant and the objections overruled, and motions made to strike it out, which motions were denied.

Witnesses were then called by the defendant and testified that the insurance company after the insurance of the insured life insurance company, on its record books, that the first record was made on the record of loss on the basis of insurance issued by the Metropolitan Life Insurance Company. This question was objected to by plaintiff, and the objection was sustained by the court.

Charles Baker, assistant manager - supervisor of the Metropolitan Life Insurance Company, testified that the Metropolitan Life Insurance Company paid the amount of an insurance policy to the insured, that it was in this case. The defendant was allowed to introduce its evidence, objection thereto was made and the objection sustained by the court.

Witnesses for defendant, testified that in January, 1912, he was connected with the Holy Cross Hospital as an assistant; that he knew the insured during his life time and had talked with him; that on foot the history of the insured when he was

in the Holy Cross Hospital, and that the sheaf of papers which he exhibited contained the history that he took at the time; that in getting this history, he asked questions of Moss and that Moss gave the answers. This witness was asked the following question by counsel for defendant: "Now doctor, did you ask him whether or not he had suffered previously from any ailment or disability?" Answer, "Yes, I did." The question and answer were objected to by counsel for plaintiff, the objection sustained, and the answer stricken. Counsel for defendant stated to the court that he wished to show that the insured died from stomach trouble, that the insured gave a history of what was the matter with him, and that he had the same ailment for two years. Objection was made to this offer, and the objection was sustained by the court. Defendant by his counsel offered to prove that in the statement made by Moss when he entered the hospital, Moss admitted he had indulged in alcoholic beverages freely, and that he had had a similar attack to the one which he suffered two years ago, of which he had fully recovered; that in the application made to the Metropolitan Life Insurance Company, at the time mentioned by plaintiff in her testimony, the insured was asked, "Are you now insured in this or any other company. If 'Yes' give particulars." And that he answered, "Metropolitan and Prudential," giving the particulars and making no mention of the policy in the Federal Life Insurance Company. This offer was also rejected by the court. This witness testified that at the time Moss entered the hospital, he was asked, "Have you ever been attended by a physician during the last five years?" and that he stated, "No." Objection was made to these questions and answers by plaintiff, and the answers were stricken from the record.

There can be no doubt but that the questions and answers, a part of the insured's application for the insurance, became a part of the contract between the insured and defendant company, and we

in the Holy Cross Hospital, and that the sheet of papers which he exhibited contained the history that he took at the time; that in getting this history, he asked questions of Moss and that Moss gave the answers. This witness was asked the following question by counsel for defendant: "Now doctor, did you ask him whether or not he had suffered previously from any ailment or disability?" Answer, "Yes, I did." The question and answer were objected to by counsel for plaintiff, the objection sustained, and the answer stricken. Counsel for defendant asked on the stand that he claimed to have that the witness that took the history, that the witness gave a history at that was the matter of his, and that he had the same ailment for two years. Objection was made to this offer, and the objection was sustained by the court. Defendant by his counsel offered to prove that in the statement made by Moss when he entered the hospital, Moss claimed to have suffered in alcoholic nervousness, and that he had had a similar attack to the one which he suffered two years ago, of which he had fully recovered; that in the application made to the Metropolitan Life Insurance Company, at the time mentioned by plaintiff in her testimony, the insured was asked, "Are you now insured in this or any other company. If 'Yes,' give particulars." and that he answered, "Metropolitan and Prudential," giving the particulars and asking no mention of the policy in the Federal Life Insurance Company. This offer was also rejected by the court. This witness testified that at the time Moss entered the hospital, he was asked, "Have you ever been attended by a physician during the last five years?" and that he stated, "No." Objection was made to these questions and answers by plaintiff, and the answers were stricken from the record.

There can be no doubt but that the questions and answers, a part of the insured's application for the insurance, became a part of the contract between the insured and defendant company, and we

are unable to understand upon what theory the court permitted evidence to be introduced by plaintiff, in making her case, which sought to vary its terms. There was no showing that the insured was under the slightest duress, or that he was misled in any degree in making his answers to the questions propounded.

By its special plea, defendant alleged that the insured had given false answers as to the condition of his health before and at the time of making the application for insurance. A witness was produced and interrogated as to statements made by the insured with regard to this matter. The court sustained objections to all this testimony. Upon what theory the court made this ruling, we are also unable to determine. We are of the opinion that defendant was denied a fair trial. Therefore, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

are unable to understand upon what theory the court permitted evidence to be introduced by plaintiff, in making her case, which sought to vary its terms. There was no showing that the insured was under the slightest duress, or that he was misled in any degree in making his answers to the questions propounded.

By its special plea, defendant alleged that the insured had given false answers as to the condition of his health before and at the time of making the application for insurance. A witness was produced and interrogated as to statements made by the insured with regard to this matter. The court sustained objections to all this testimony. Upon what theory the court made this ruling, we are also unable to say. We are of the opinion that defendant was denied a fair trial. Therefore, the judgment is reversed and the case remanded for a new trial.

REVEREND THE COURT,

HERBERT, J. J. AND JAMES, J. CONCUR.

37356

ISABELLE GLOMB, Administratrix of
the Estate of Walter Glomb, deceased,

Appellee,

v.

CHICAGO MOTOR COACH COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

279 I.A. 623⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County for \$2,000.00, entered in a suit of Isabelle Glomb, Administratrix of the Estate of Walter Glomb, deceased, against the Chicago Motor Coach Company. The trial was by jury, and the judgment was entered upon a verdict for the amount mentioned in favor of plaintiff. The action is to recover for alleged pecuniary loss by the next of kin of Walter Glomb, occasioned by his death. The action was originally brought against Malcom Pearlman, Victor Pearlman and the Chicago Motor Coach Company. Prior to the trial, and in consideration of the sum of \$2,500.00 paid to her, plaintiff entered into a covenant not to sue with Malcom and Victor Pearlman and the suit was dismissed as to them.

The charge in the declaration as to the defendant, Chicago Motor Coach Company, is that the intestate on the 5th day of September, 1931, alighted from a north bound motor coach of defendant company, which had come to a stop at a point north of Ardmore Avenue and at the east curb line of Sheridan Road in the City of Chicago; that deceased attempted to cross the street in front of the motor coach, and that the motor coach started and moved three or four feet and stopped; that when the motor coach started, the deceased jumped and came in front of a north bound automobile, which struck him and killed him, carrying him about 80 feet. Defendant's position is that the motor coach, after it had come to a stop at the point mentioned, did

THE ESTATE OF WALTER BLOOM, DECEASED,

Appellee,

v.

CHICAGO MOTOR COACH COMPANY,

Appellant.

CHICAGO COUNTY

COOK COUNTY

279 I.A. 623

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County for \$5,000.00, entered in a suit of Isabelle Bloom, Administratrix of the Estate of Walter Bloom, deceased, against the Chicago Motor Coach Company. The trial was by jury, and the judgment was entered upon a verdict for the amount mentioned in favor of plaintiff. The action is to recover for alleged pecuniary loss by the next of kin of Walter Bloom, deceased by his death. The action was originally brought against Malcolm Pearlman, Victor Pearlman and the Chicago Motor Coach Company. Prior to the trial, and in consideration of the sum of \$5,000.00 paid to her, plaintiff entered into a covenant not to sue with Malcolm and Victor Pearlman and the suit was dismissed as to them.

The charge in the declaration as to the defendant, Chicago

Motor Coach Company, is that the intestate on the 25th day of September 1921, alighted from a north bound motor coach of defendant company, which had come to a stop at a point north of Ardmore Avenue and at the east end line of Sheridan Road in the City of Chicago; that deceased attempted to cross the street in front of the motor coach, and that the motor coach started and moved three or four feet and stopped; that when the motor coach started, the deceased jumped and was in front of a north bound automobile, which struck him and killed him, carrying him about 80 feet. Defendant's position is that the motor coach, after it had come to a stop at the point mentioned, did

not move until after the deceased had been struck by the automobile, and that he was guilty of failure to exercise care for his safety. Sheridan Road, at the point in question, runs north and south, and Ardmore Avenue runs east and west and intersects Sheridan Road near the place of the accident.

Plaintiff produced one witness in support of her claim, named Sterling S. Jones. This witness testified in substance that on September 5th, 1931, at about 2 o'clock in the afternoon, and just before the accident, he was playing ball on the lake beach east of the point of the accident, and that he was approximately 30 feet from the east curb line of Sheridan Road at the time of the accident; that he saw the bus there, and that when he first saw it, the rear of the bus was approximately 4 feet south of the north curb line of Ardmore Avenue; that he saw the bus approach going north, and that it was then about 35 feet from the place where it came to a dead standstill; that he saw the people getting off, and that he saw the young man, whom he afterwards ascertained was Walter Glomb, as he alighted from the bus; that the step from which he (Walter Glomb) alighted was at the front end of the bus, and that there were other passengers getting off in front of him; that while the bus was standing, Glomb walked west around in front of it, and that his, Glomb's left side was then about 2 feet from the front end of the bus; that the driver of the bus was stooped over, and that at the sound of metallic grinding of gears, the driver jumped, and at that time, Glomb had passed the radiator cap in the line of the vision of the witness. The testimony of this witness, as shown by the abstract, then continues as follows: "When the bus started, ^(meaning Glomb) he jumped into the air. He jumped to the north and then to the west. I mean in a northwesterly direction. He got beyond the line of the west side of the bus before anything happened. He was past the front line of the

not move until after the accident had been struck by the automobile, and that he was guilty of failure to exercise care for his safety. Sheridan Road, at the point in question, runs north and south, and Audmore Avenue runs east and west and intersects Sheridan Road near the place of the accident.

Plaintiff produced one witness in support of her claim, named Sterling G. Jones. This witness testified in substance that on September 25th, 1921, at about 3 o'clock in the afternoon, and just before the accident, he was playing ball on the lake beach east of the point of the accident, and that he was approximately 50 feet from the east curb line of Sheridan Road at the time of the accident; that he saw the bus there, and that when he first saw it, the rear of the bus was approximately 4 feet south of the north curb line of Audmore Avenue; that he saw the bus approach going north, and that it was then about 15 feet from the place where it was in a dead standstill; that he saw the people getting off, and that he saw the young man, whom he afterwards ascertained was Walter Glomp, as he alighted from the bus; that the stop from which he (Walter Glomp) alighted was at the front end of the bus, and that there were other passengers getting off in front of him; that while the bus was standing, Glomp walked west around in front of it, and that his, Glomp's left side was then about 3 feet from the front end of the bus; that the driver of the bus was stooped over, and that at the same time, metallic grinding of gears, the driver jumped, and at that time, Glomp had passed the radiator cap in the line of the vision of the witness. The testimony of this witness, so much as it relates to the accident (meaning Glomp) then continued as follows: "When the bus started, he jumped into the air. He jumped to the north and then to the west. I mean in a westerly direction. He got beyond the line of the west side of the bus before anything happened. He was past the front line of the

bus. He was quite clear of it; approximately two feet when the bus started. When the bus started, Walter was about the center of the bus. My line of vision was about the radiator cap. When the bus started at that time, he went in a northwesterly direction, jumped. I saw him struck by the automobile going north. He traveled about six feet from the point when he was approximately in front of the radiator cap and in the north of the bus before it struck him. The car that struck him went about 100 feet before it came to a stop. *** As to what the bus did after it started, the bus approached - started - and rolled about a yard or four feet, three feet or four feet, and then stopped, before the young fellow was picked up in an automobile and carried north. The bus did not hit him. It was a car from the south running north instead of the bus that hit him."

On cross-examination, this witness testified that "the lake itself is 200 feet east of the east sidewalk of Sheridan Road. I was on the beach at the time the accident happened, playing catch. We were between 50 and 60 feet from Sheridan Road. You asked me if I was playing ball, - but I had retrieved the ball - it was then 30 feet east - it was then over my head. While playing ball, I was standing there and ran the direction of the bus - I could not miss the accident. *** I saw the Cadillac behind the bus after the bus had stopped. At the time the bus came to a stop, it was not visible. *** When the coach came to a stop, the rear end went into Ardmore Avenue about six feet. The body line was hugging the curb."

Malcom Pearlman, a witness for defendant, testified that he was driving a car north on Sheridan Road at about Ardmore Avenue about 3 o'clock in the afternoon on the day of the accident; that he left the center line of Sheridan Road, possibly two or three feet in order to pass the bus; that "near Ardmore a boy went out in front of my car and I injured him. * * * I saw a motor coach there. The motor coach was about 20 feet from the corner of Ardmore, discharging

2 bus. He was quite clear of it; approximately two feet when the bus started. When the bus started, Walter was about the center of the bus. My line of vision was about the radiator cap. When the bus started at that time, he went in a northeasterly direction, jumped. I saw him struck by the automobile going north. He traveled about six feet from the point when he was approximately in front of the radiator cap and in the north of the bus before it struck him. The car that struck him went about 100 feet before it came to a stop. "As to what the bus did after it started, the bus approached - started - and rolled about a yard or two feet, three feet or four feet, and then stopped, before the young fellow was picked up in an automobile and carried north. The bus did not hit him. It was a car from the south running north instead of the bus that hit him." On cross-examination, this witness testified that "the late itself is 200 feet east of the east sidewalk of Sheridan Road. I was on the bench at the time the accident happened, playing catch. We were between 80 and 90 feet from Sheridan Road. You asked me if I was playing ball, -- but I had retrieved the ball -- it was then 80 feet east -- it was then over my head. While playing ball, I was standing there and saw the direction of the bus -- I could not witness the accident. "I saw the Cadillac behind the bus after the bus had stopped. At the time the bus came to a stop, it was not visible. "When the coach came to a stop, the rest went into Anderson Avenue about six feet. The body line was hugging the curb." Helson Testman, a witness for defendant, testified that he was driving a car north on Sheridan Road at about Anderson Avenue about 2 o'clock in the afternoon on the day of the accident; that he left the center line of Sheridan Road, possibly two or three feet in order to pass the bus; that "near Anderson a boy went out in front of me and I injured him. " * * * I saw a motor coach there. The motor coach was about 20 feet from the front of Anderson, standing

passengers. It was alongside of the curb of Sheridan Road. As I passed the coach a boy ran out in front of my car. I stopped as quickly as I could. * * * As to whether I looked toward the bus when he jumped out, at a time like that I really didn't notice anything; I saw the bus was there. The bus was where it was when I passed it. *** The coach was standing when I passed. The coach was not moving when I was alongside of it."

On cross-examination, this witness was asked this question:

"Q. Do you know whether or not it moved three or four feet?"

"A. I think the coach might have."

"The Court: Do you know?"

"A. To my knowledge the coach was standing."

"The Court: Did it move or didn't it move?"

"A. It did not move."

William Elkins, for defendant, testified that he was the driver of the motor coach in question, and at the time and place in question. As to the accident, he testified as follows: "I made a stop at the regular stopping place. Several passengers got off and several got on and I heard some brakes screeching. The regular stopping place is 30 feet, I guess it is, north of the curbstone and about a foot away from the curb of Sheridan Road. After I heard the brakes screeching the car (meaning the automobile) stopped and they were pulling some fellow into the car. Some fellows came over after a while and helped put the fellow into the car. My motor coach was standing still. From the time I heard the screeching of the brakes until the time I saw this man picked up, my coach did not move. Standing still all the time. *** I didn't see this man cross in front of my coach. I was watching my passengers getting on and off."

Lillian O'Biern, a witness for defendant, testified as follows: "On that date I was a passenger on a coach at Sheridan Road near Ardmore, about 2 o'clock. I sat on the right hand side,

passengers. It was alongside of the curb of Sheridan Road, as I

passed the coach a boy ran out in front of my car. I stopped as quickly as I could. As to whether I looked toward the bus when he jumped out, at a time later that I really didn't notice anything; I saw the bus was there. The bus was where it was when I passed it. *** The coach was standing when I passed. The coach was not moving when I was alongside of it."

On cross-examination, this witness was asked this question:

"Q. Do you know whether or not it moved three or four feet?"

"A. I think the coach might have."

"The Court: Do you know?"

"A. To my knowledge the coach was standing."

"The Court: Did it move or didn't it move?"

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William Ekins, for defendant, testified that he was the driver of the motor coach in question, and at the time and place in question. As to the accident, he testified as follows: "I made a stop at the regular stopping place. Several passengers got off and several got on and I heard some brakes squeaking. The regular stopping place is 30 feet, I guess it is, north of the outposts and about a foot away from the curb of Sheridan Road. After I heard the brakes squeaking the car (meaning the automobile) stopped and they were pulling some fellow into the car. Some fellows came over after a while and helped get the fellow into the car. By motor coach was standing still. From the time I heard the squeaking of the brakes until the time I saw this man picked up, my coach did not move. Standing still all the time. *** I didn't see this man come in front of my coach. I was watching my passengers getting on and off."

William O'Brien, a witness for defendant, testified as

follows: "On that date I was a passenger on a coach at Sheridan Road near Ardmore, about 2 o'clock. I sat on the right hand side,

upper deck. As the coach approached Ardmore Avenue, the coach stopped and we heard screeching of brakes. We got up and looked to the left side of the bus and looked over. We saw them taking this boy in the car." She was then asked the following questions by defendant's counsel:

"Q. Had the coach moved?" (Objection by plaintiff as leading, sustained.)

"Q. At the time the coach made its first stop at Ardmore Avenue until the time that the young man was picked up and placed in the car, did the coach move?" (Objection by plaintiff sustained.)

"Q. From the time that the coach came to a stop at Ardmore Avenue and you heard the squeaking of the brakes and the car stopped and the young man was picked up and placed in the car, would you say the coach moved?" (Objection by plaintiff sustained.)

This witness then testified that

"The coach stopped and we heard the squeaking of the brakes and we got up and looked over and saw them putting the boy in the car. Sat there awhile and that is all. When we looked over the side of the car, the coach was parked along there where it stopped."

On cross-examination, she testified as follows: "I was on the upper deck. If the bus moved two or three feet I would have known it. I did not see him hit and knocked down."

On the hearing on the motion for a new trial, which was overruled, defendant presented the affidavit of Walter N. Murray, one of defendant's attorneys, in which the affiant states in substance that neither he, nor to the best of his knowledge and belief, anyone connected with the defendant, knew of the existence of the witness named Sterling S. Jones until Jones appeared on the witness stand on behalf of the plaintiff; that affiant talked with the police officer who had made a note of the witnesses names, and had seen the police report of the accident, and that Jones' name did not appear thereon, and that the police officer who took the names of these witnesses afterward told the affiant that in taking the names of the witnesses, he did not secure Jones' name; that on the trial of the

stopped and we heard something of brakes. He got up and looked to the left side of the bus and looked over. He saw them taking this boy in the car. He was then asked the following questions by defendant's counsel:

"Q. And the coach moved? (Objection by Plaintiff as immaterial, sustained.)

"Q. At the time the coach made its first stop at Ardmore Avenue until the time that the young man was picked up and placed in the car, did the coach move? (Objection by Plaintiff sustained.)

"Q. From the time that the coach came to a stop at Ardmore Avenue and you heard the squeaking of the brakes and the car stopped and the young man was picked up and placed in the car, would you say the coach moved? (Objection by Plaintiff sustained.)

This witness then testified that

"The coach stopped and we heard the squeaking of the brakes and we got up and looked over and saw them putting the boy in the car. But there while and that is all. Then we looked over the side of the bus, the coach was moving along West 4th Street."

On cross-examination, she testified as follows: "I was on the upper deck. If the bus moved two or three feet I would have known it. I did not see him hit and knocked down."

On the hearing on the motion for a new trial, which was overruled, defendant presented the affidavit of Walter H. Murphy,

one of defendant's attorneys, in which the affiant states in

substantially that neither he, nor to the best of his knowledge and belief,

knows connected with the defendant, knew of the existence of the

witness named Sterling E. Jones until Jones appeared on the witness

stand on behalf of the plaintiff; that affiant talked with the police

officer who had made a note of the witness' name, and had seen the

police report of the accident, and that Jones' name did not appear

thereon, and that the police officer who took the names of these

witnesses afterward told the affiant that in taking the names of the

witnesses, he did not receive Jones' name; that on the trial of the

cause, he, the affiant, tried the case and had no means of impeaching any statement made by Jones; that immediately after the trial, he investigated the matter for the purpose of determining whether or not Jones was an eye-witness to the occurrences about which Jones testified, and that he was then informed by representatives of the General Accident, Fire and Life Assurance Corporation, which had made a settlement in behalf of certain defendants in this cause, that Jones had made a statement to them regarding the accident in question. A copy of this alleged statement of Jones is made a part of this affidavit presented on the hearing on the motion for a new trial, and is as follows:

"September 8, 1931. My name is Sterling S. Jones, age 36, reside at 1944 Montrose Ave. Phone (non8). Estimating plastering, etc. Business - Van Idersteine - Long Beach 4644.

About 2 p.m. Sept. 5, 1931, I was playing ball on the beach near the foot of Ardmore Avenue and just ready to catch a ball when I noticed a body thrown in the air about 5 feet high and the next instant a woman screamed. I immediately ran over to the Blvd. Sheridan Rd. and assisted two life guards in placing the man who had been struck into a Cadillac Coupe owned by Mr. Pearlman. I did not see the actual contact of any automobile strike the injured man, who I later learned was Walter Glomb, one of the life guards. I was about 60 feet away from the street at the time and cannot truthfully say just what car struck this man. I am not sure whether the car we put this injured man into was a Cadillac or a Packard.

(Signed) Sterling S. Jones."

In People v. Heinen, 300 Ill. 498, the Supreme Court said:

"Where there is diligence, and the new matter does not conflict with the rule concerning cumulative evidence, and is such as to strengthen the conviction that justice has not been done, a new trial should be granted. (People v. Cotell, 298 Ill. 207; People v. Wright, 287 id. 580; Wilder v. Greenlee, 49 id. 253.)

In presenting the matter contained in this affidavit in support of its motion for a new trial, which we deem to be pertinent to the inquiry here, it is shown that defendant in thus calling the court's attention to the statement of the witness Jones, was as diligent as was possible. Jones is the only witness whose testimony

cause, he, the affiant, tried the case and had no means of ascertaining any statement made by Jones; that immediately after the trial, he investigated the matter for the purpose of determining whether or not Jones was an eye-witness to the occurrence about which Jones testified, and that he was then informed by representatives of the General Accident, Fire and Life Assurance Corporation, which had made a settlement in behalf of certain defendants in this cause, that Jones had made a statement to them regarding the accident in question. A copy of this alleged statement of Jones is made a part of this affidavit presented on the hearing on the motion for a new trial, and is as follows:

"September 2, 1931. My name is Sterling E. Jones,
now 86, residing at 1841 Western Ave., Iowa (home). Registration
Certificate, etc. Issued - Van Ickevoyen - Iowa dated 4-24-

and we put this injured man into one of a Cadillac or a Packard. I am not sure whether the car just was struck this man. I am not sure whether the last way from the street at the time was narrow. I was rather young, one of the life guards. I was about 20 years old. I was a life guard, who I later learned any reasonable strike the injured man, who I later learned owned by Mr. Perkins. I did not see the actual contact in placing the man who had been struck into a Cadillac or over to the Blvd. Sheridan St. and assisted two life guards high and the man landed a woman's car. I immediately called when I noticed a body thrown in the air about 5 feet from the foot of Indiana Avenue and just away to the left about 2 miles. I was driving back on the

(Signed) Sterling B. Jones.

In People v. Heinen, 300 Ill. 498, the Supreme Court said:

[illegible]

the court's attention to the statement of the witness Jones, was as diligent as was possible. Jones is the only witness whose testimony to the inquiry here, it is shown that defendant in thus calling support of its motion for a new trial, which we deem to be pertinent in presenting the matter contained in this affidavit is

at all, supported plaintiff's theory. We are of the opinion, after a consideration of the whole record,, that the court was in error in refusing to grant a new trial, and that the judgment should be and it is reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

of all, repeated Einstein's theory. He was of the opinion, after
a consideration of the whole theory, that the world was in fact
in a state of a new trial, and that the judgment should be
left to the future and the course reversed.

REVEREND THE PRESIDENT.

REVEREND THE PRESIDENT, I am,

37376

PRUDENTIAL LIFE INSURANCE COMPANY
OF AMERICA, a corporation,

v.

ARNOLD FENNER, et al.,

On Appeal of PHILIP CONLEY, as
Administrator de bonis non of
the Estate of Anna Jaroszewicz,
Deceased,

(Defendant) Appellant,

v.

ARNOLD FENNER,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

279 I.A. 624¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an amended decree of the Circuit Court of Cook County, awarding to Arnold Fenner the entire amount of an insurance policy issued upon the life of one Anna Jaroszewicz, deceased, the beneficial interest in which had been assigned by her to Arnold Fenner prior to her death. In the decree as amended, the court also found that an alleged claim of the administrator of the Estate of Anna Jaroszewicz against Arnold Fenner is without merit, and by the decree this claim is denied. It is this last mentioned portion of the decree that is in question here.

Originally, a bill of interpleader was filed in the Circuit Court of Cook County by the Prudential Life Insurance Company of America against Arnold Fenner and the Estate of Anna Jaroszewicz, seeking to have determined the ownership of the proceeds of an insurance policy in that company upon the life of Anna Jaroszewicz. The beneficial interest in this policy had been assigned to Fenner by the assured. Upon the issues made and joined in that case, by the bill, the answer of Fenner, and the cross complaint of the administrator of the estate, the cause was referred to a Master in Chancery, who heard the evidence, made a report in which he found that the funds belonged to Arnold Fenner, and recommended that a decree be entered

OF THE COURT, a corporation,

ARNOLD BARNETT, et al.,

On appeal of WILLIAM BARNETT, as
administrator of the estate of
the late of Anna Jaroszewicz,
deceased,
(Respondent) Plaintiff,

v.

ARNOLD BARNETT,

(Respondent) Defendant.

IN COURT

DOCK COUNTY.

273 I.A. 624

MR. JUSTICE WILL BELIEVED THE OPINION OF THE COURT.

This is an appeal from an amended decree of the Circuit

Court of Cook County, awarded to Arnold Barnett the entire amount

of an insurance policy issued upon the life of one Anna Jaroszewicz,

deceased, the beneficial interest in which had been assigned by

her to Arnold Barnett prior to her death. In the decree as amended,

the court also found that an alleged claim of the administrator

of the estate of Anna Jaroszewicz against Arnold Barnett is without

merit, and by the decree this claim is denied. It is this last

mentioned portion of the decree that is in question here.

Originally, a bill of interpleader was filed in the Circuit

Court of Cook County by the Prudential Life Insurance Company of

America against Arnold Barnett and the Estate of Anna Jaroszewicz,

seeking to have determined the ownership of the proceeds of an

insurance policy in that company upon the life of Anna Jaroszewicz.

The beneficial interest in this policy had been assigned to Barnett

by the insured. Upon the issues made and joined in that case, by the

bill, the answer of Barnett, and the cross complaint of the adminis-

trator of the estate, the cause was referred to a Master in Chancery,

who heard the evidence, made a report in which he found that the funds

belonged to Arnold Barnett, and recommended that a decree be entered

to that effect. Exceptions to the Master's report only on the question of the ownership of the funds were sustained by the court, who found that the funds belonged to the Estate of Anna Jaroszewicz, and entered a decree accordingly. There was no finding nor order of the court with reference to the matter in issue here. On appeal to this court, it was found and determined that the funds in issue belonged to Arnold Fenner, and the decree of the Circuit Court was ordered reversed and remanded with the direction to the Circuit Court that a decree be entered in accordance with the opinion of this court. Thereafter, a petition was filed in the Supreme Court, seeking to have the finding and order of this court reviewed by certiorari, which petition was denied. A mandate was filed in the Circuit Court, and subsequently the amended decree in question was entered in that court, by which the funds in issue were awarded to Arnold Fenner, and, as stated, the claim against the estate was denied. The former appeal in this court is numbered 36050, and on January 26th, 1934, an order was entered here that the record filed in that case be considered in connection with the appeal in the instant case.

The only issue before this court in the former hearing, was whether or not an assignment of the beneficial interest in the insurance policy by the assured to Fenner was absolute, or whether it was made to secure an alleged indebtedness of the assured to Fenner. There was no suggestion that the claim in question be allowed as against Fenner. Upon the only issue here, the representatives of the estate adopted a dual theory. First, as stated, it was insisted that the assignment of the policy was made only for the purpose of securing the alleged indebtedness of the assured to Fenner; second, that if such theory advanced by them, were correct, still it had no merit, because of the fact that the assured was not indebted to Fenner, but that Fenner was indebted to her, and for that reason, the

assignment had no validity.

It is shown clearly by the evidence in the case, that without limitation, the assured had assigned all the assurable interest in the policy to Fenner; that she had frequently stated to disinterested persons, including agents of the insurance company, that she was indebted to Fenner in a considerable amount, and that she desired to secure him against loss in case of her death; that she stated to others that she desired to have a business, in which she and Fenner were mutually interested, continued in case of her death, and that in such event, it was her desire that Fenner should have the proceeds of the policy, in order that he might continue such business.

The following document was presented to the Master, marked for identification, and was offered by the administrator solely for the purpose of showing that Fenner was indebted to Anna Jaroszewicz, and that she was not indebted to him;

Chicago, Dec. 20, 1926.

Let this be known that I - Arnold Fenner owe to Miss A. Z. Traczowna \$2565 two thousand five hundred and sixty-five dollars.

A. Fenner,
1741 Washington Bld.
Chicago, Ill."

The Master considered this document heard evidence concerning it, and made a finding with reference to it. It is this instrument upon which the claim is made that Fenner is indebted to the Estate of Anna Jaroszewicz.

On the hearing before the Master, one Walter C. Cecil testified in substance that, prior to the execution of the document in question, he heard a conversation between Miss A. Z. Traczowna and Arnold Fenner regarding their financial affairs; that she stated that if Fenner would make out a note or statement signed by him, that she could borrow some money on it, and that Fenner wrote out the document

assignment had no validity.

It is shown clearly by the evidence in the case, that without limitation, the secured and assigned all the assets interest in the policy to Tennor; that she had frequently stated to disinterested persons, including agents of the insurance company, that she was indebted to Tennor in a considerable amount, and that she desired to secure his against loss in case of her death; that she stated to others that she desired to have a business, in which she and Tennor were mutually interested, continued in case of her death, and that in such event, it was her desire that Tennor should have the proceeds of the policy, in order that he might continue such business.

The following document was presented to the Master, marked for identification, and was offered by the administrator solely for the purpose of showing that Tennor was indebted to Anna Larverius, and that she was not indebted to him;

Chicago, Dec. 30, 1936.

Let this be known that I - Arnold Tennor owe to Miss A. Larverius the sum of \$500.00 and fifty cents.

A. Tennor,
1742 Washington Bld.
Chicago, Ill.

The Master considered this document heard evidence concerning it, and made a finding with reference to it. It is this instrument upon which the claim is made that Tennor is indebted to the estate of Anna Larverius.

On the hearing before the Master, one Walter W. Cecil testified in substance that, prior to the execution of the document in question, he heard a conversation between Miss A. E. Larverius and Arnold Tennor regarding their financial affairs; that she stated that if Tennor would make out a note or statement signed by him, that she would advance some money on it, and that Tennor wrote out the document

in question and signed it; that she said, "I want to give him the money he has coming from me (referring to Fenner)." Further, she said, "I want to borrow this money on the strength of this note, and that is the reason I want to use the note;" that she further stated that she could thereby get money she needed for herself, that she could also give Fenner some money she owed him for salary, and that she at that time owed Fenner certain moneys. No evidence was offered by the administrator to contradict this testimony.

Upon the matter in issue here, the Master found and reported to the court that the note for \$2,565 of December 20th, 1926, was signed by Arnold Fenner and delivered by him to the deceased, not as evidence of indebtedness, but as an instrument to be used by Miss Traczowna as collateral security for a loan to secure funds to pay Arnold Fenner on account of his salary. In the cross complaint filed by the administrator, there is a prayer for an accounting between the parties, and in the decree appealed from, the court approves the report and recommendations of the Master in all particulars, including this claim. We are of the opinion that from the evidence adduced, the Master was correct in his report and finding, that the court had jurisdiction of the parties and the subject matter, and that the decree of the court is fully supported by the evidence. Therefore, the decree is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

in question and signed it; that she said, "I want to give him the money he has coming from me (relating to Kennard)." Further, she said, "I want to borrow this money on the strength of this note, and that is the reason I want to use the note;" that she further stated that she could thereby get money she needed for herself, that she could also give Kennard some money she owed him for salary, and that she at that time used Kennard's name, as evidence was offered by the administration to establish this testimony.

Upon the matter in issue here, the Master found and reported to the court that she said that she had signed the note, was signed by Arnold Kennard and delivered by him to the deceased, not as evidence of indebtedness, but as an instrument to be used by Miss Thompson as collateral security for a loan to secure funds to pay Arnold Kennard on account of his salary. In the cross complaint filed by the administrator, there is a prayer for an accounting between the parties, and in the decree appealed from, the court approves the report and recommendations of the Master in all particular, including this claim. We are of the opinion that from the evidence adduced, the Master was correct in his report and finding, that the court had jurisdiction of the parties and the subject matter, and that the decree of the court is fully supported by the evidence.

Therefore, the decree is affirmed.

APPROVED.

WILLIAM H. HARRIS, J. CLERK.

37631

ALEXANDER GRANT, IVER R. JOHNSON and
MILO B. HOPKINS, co-partners doing
business as ALEXANDER GRANT & CO.,

(Plaintiffs) Defendants in Error, ERROR TO

v.

JOHN A. HEIST,

(Defendant) Plaintiff in Error.

SUPERIOR COURT,

COOK COUNTY.

279 I.A. 624²

MR. JUSTICE WILSON delivered the opinion of the court.

This is a writ of error sued out by the defendant to reverse a judgment at law rendered in favor of plaintiffs on September 25, 1923, for \$1,058.90. The action was in assumpsit and the case was tried by the court without a jury.

No question of law is raised but the defendant insists that the services alleged to have been performed were at the special instance and request of the Carlton Hotel Company and not the defendant. From the facts it appears that the plaintiffs were certified public accountants.

Grant, a member of the plaintiff partnership, testified that he had performed services ^{previously} for Heist and was acquainted with him; that on or about April 15, 1929, Heist telephoned him and stated that he and several other persons were at a meeting and contemplated investing some money in a hotel project, but before they did so desired to have an audit made of the books of the hotel company.

Grant testified further that he started two of their employees at work on the books and two or three days later called up Mr. Heist and told him that the affairs of the hotel were in a

ALABAMA COURT, JOHN A. WILSON, JR.
WILSON & WILSON, ATTORNEYS AT LAW
PRACTICE IN ALABAMA COURT & CO.

(Plaintiff) Defendant in Error

BRANCH TO

SUPERIOR COURT

COOK COUNTY

v.

JOHN A. WILSON, JR.

(Defendant) Plaintiff in Error

275 A 634

MR. JUSTICE WILSON delivered the opinion of the court.

This is a writ of error sued out by the defendant to
reverse a judgment of the defendant in favor of plaintiff on
September 28, 1928, for \$1,086.00. The action was in assumpsit
and the case was tried by the court without a jury.

No question of law is raised but the defendant insists
that the services alleged to have been performed were of the
special character and request of the defendant's company and not
the defendant. From the facts it appears that the plaintiff
was entitled to his compensation.

WITNESSES, a member of the plaintiff's partnership, testified
previously
that he had conferred with the defendant and was acquainted with
him; that on or about April 15, 1928, Neist telephoned him and
stated that he and several other persons were at a meeting and
contemplated issuing some money in a hotel project, but before
they did so desired to have an audit made of the books of the
hotel company.

Grant testified further that he started two of their
employees at work on the books and two other days later called
up Mr. Neist and told him that the affairs of the hotel were in a

bad condition and asked him if they should go ahead and was told that they should and would have nothing to worry about in reference to payment for services. The witness testified that he knew nobody connected with the Carlton Hotel and that he talked with nobody but Heist about the job; that at the time he made arrangements with Heist he quoted him the rates per day for both senior and junior accountants; that at the request of Mr. Heist the final audit was directed to the Board of Directors of the Carlton Hotel and statements were sent to Heist. He further stated that he had some correspondence with the defendant in regard to the claim and was not told until many months afterwards that he was to look to somebody other than Heist for payment.

The employees of the plaintiffs testified as to the time consumed by them in auditing the books and the account was received in evidence.

Heist testified that he called the plaintiff Grant and told him that the directors of the Carlton Hotel Company had decided to have an audit made of the books and that he, Heist, had suggested the plaintiff's name and asked him when he could start the work. He denied having told Grant that he contemplated investing money in the hotel project and also stated that he told Grant the work was to be done for the hotel.

There are no records of the directors of the hotel in evidence, nor is there any resolution on the part of the directors authorizing the employment of a public accountant to examine its books.

The trial court heard the evidence and saw the witnesses and was in a better position to weigh the evidence than would be a court of review.

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that they should and would have nothing to worry about in reference
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he quoted him the rates per day for both senior and junior account-
ants; that at the request of Mr. Heist the final audit was directed
to the Board of Directors of the Carlton Hotel and statements were
sent to Heist. He further stated that he had some correspondence
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many months afterwards that he was to look to somebody other than
Heist for payment.

The employees of the plaintiff testified as to the time
consumed by them in auditing the books and the account was received
in evidence.

Heist testified that he called the plaintiff Grant and
told him that the directors of the Carlton Hotel Company had authorized
to have an audit made of the books and that he, Heist, had suggested
the plaintiff's name and asked him when he could start the work.
He denied having told Grant that he contemplated investing money in
the hotel project and also stated that he told Grant the work was to
be done for the hotel.

There are no records of the directors of the hotel in
evidence, nor is there any resolution on the part of the directors
authorizing the employment of a public accountant to examine the
books.

The trial court heard the evidence and saw the witnesses
and was in a better position to weigh the evidence than would be a
court of review.

We see no reason for disturbing the judgment of the Superior Court and it is, therefore, affirmed.

9 JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

37642

CHICAGO TITLE & TRUST COMPANY,
a corporation, as Trustee,

Appellee,

v.

D. L. BUTOW, doing business as
BUTOW SYSTEM SERVICE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 624³

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment in forcible detainer brought by the Chicago Title & Trust Company, a corporation, as trustee, against the defendant D. L. Butow, doing business as Butow System Service. The only issue involved is one of fact.

The defendant insists that by payment of rent he was entitled to possession of certain premises located on Prairie avenue in the City of Evanston, Illinois. Plaintiff insists that no lease was made to said premises and that the money paid as rent was, in fact, a deposit.

A witness, Mitchell, called on behalf of plaintiff, testified that his firm was the renting agency for the Chicago Title & Trust Company and that he attempted to negotiate a lease with Butow, the defendant; that he prepared a lease and presented it to Butow and that when Butow brought it back to him, Mitchell, he told Butow he would submit it and that he should pay a month's rent in advance. This was in the month of February. The witness further testified that during this month he telephoned the defendant and told him that the Chicago Title & Trust Company had refused to enter into a lease and was returning it; that the lease which had been prepared ran from March 1, 1934, for a period of three years.

CHICAGO TITLE & TRUST COMPANY,
a corporation, as trustee,

appellee,

v.

U. S. BROTHERS, doing business as
BUTOW SYSTEM SERVICE,

appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

289 I.A. 624

MR. JUSTICE WINSTON delivered the opinion of the court.

This is an appeal from a judgment in forcible detainer brought by the Chicago Title & Trust Company, a corporation, as trustee, against the defendant U. S. Brothers, doing business as Butow System Service. The only issue involved is one of fact.

The defendant insists that by payment of rent he was entitled to possession of certain premises located on Erie Avenue in the City of Evanston, Illinois. Plaintiff insists that no lease was made to said premises and that the money paid as rent was, in fact, a deposit.

A witness, Mitchell, called on behalf of plaintiff,

testified that his firm was the renting agency for the Chicago Title & Trust Company and that he attempted to negotiate a lease with Butow, the defendant; that he prepared a lease and presented it to Butow and that when Butow brought it back to him, Mitchell, he told Butow he would submit it and that he should pay a month's rent in advance. This was in the month of February. The witness further testified that during this month he telephoned the defendant and told him that the Chicago Title & Trust Company had refused to enter into a lease and was returning it; that the lease which had been prepared ran from March 1, 1934, for a period of three years.

The defendant Butow testified that he talked with Mitchell and paid him the rent for the first month; that he moved into the premises some time in February; that Mithhell never told him that the lease had to be approved by the Chicago Title & Trust Company, but that he did say that he would see the other parties before he, Butow, signed the lease.

Olive Mae Brown, a witness called on behalf of plaintiff in rebuttal, testified that she had a talk with the defendant in which he said he did not see why he should bring in money to show good faith and that on February 19th Butow said to her, "Supposing the lease isn't accepted, what about my \$30," and she replied, "It is not customary for our office to retain earnest money deposits in the event we are not able to obtain the acceptance of the lease." This was denied by the defendant.

From the evidence it appears that no lease was signed by the Chicago Title & Trust Company, as trustee of the premises.

The trial court heard the evidence and saw the witnesses and found that the defendant did not have a lease and was not entitled to possession and evidently was of the opinion that the \$30 payment was earnest money and not rent. We see no reason for disturbing its finding as the evidence is conflicting.

For the reasons stated in this opinion the judgment of the Municipal Court of Evanston is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

JOHN W. CONGENT

The following is a list of the names of the persons who are named in the foregoing opinion.

For the reasons stated in this opinion the judgment of

dismissing the finding as the evidence is conflicting.

\$20 interest and amount paid and not paid. It was the finding of the jury that the defendant did not have a lease and was not entitled to possession and evidently was of the opinion that the

The trial court heard the evidence and saw the witnesses

of the Chicago Title & Trust Company, as trustee of the lease.

From the evidence it appears that no lease was signed

This was denied by the defendant.

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Good faith and that on February 15th Jones said to her, "I understand

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Olive Mae Brown, a witness called on behalf of plaintiff

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the lease had to be approved by the Chicago Title & Trust Company,

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and paid him the rent for the first month; that he moved into the

The defendant Butow testified that he talked with Mitchell

37666

PEOPLE OF THE STATE OF ILLINOIS,
ex rel WILLIAM F. JAHN,

Appellant,

v.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

CITY OF CHICAGO, a municipal corporation; EDWARD J. KELLY, Mayor of the City of Chicago; DANIEL J. CARMODY, Commissioner of the Fire Department of the City of Chicago; MICHAEL J. CORRIGAN, Chief Fire Marshal of the City of Chicago; RICHARD J. COLLINS, JOSEPH P. GEARY, and ALBERT O. ANDERSON, Members of the Civil Service Commissioners of the City of Chicago; JAMES A. KEARNS, Treasurer of the City of Chicago; ROBERT E. UPHAM, Comptroller of the City of Chicago,

Appellees.

279 I.A. 624^H

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff instituted his proceedings in the Superior Court of Cook County in mandamus seeking a writ to compel the defendants, City of Chicago, Edward J. Kelly, Mayor of the City of Chicago, Daniel J. Carmody, Commissioner of the Fire Department, the Civil Service Commissioners of the City of Chicago, and others, to certify petitioner to the position of Captain of the Fire Department of the City of Chicago. This petition was filed July 6, 1933, and a general demurrer was interposed by the defendants. The demurrer was sustained by the trial court and an appeal from that order taken to this court.

The essential facts set forth in the petition seeking the writ alleges that the petitioner Jahn entered the services of the city as a fireman in the fire department on August 1, 1914, and was subsequently promoted to the rank of lieutenant in the

People of the State of Illinois,
as Petitioner v. State

Appellant,

v.

CITY OF CHICAGO, a municipal corporation;
JAMES H. HANCOCK, Mayor of the
City of Chicago; DANIEL J. GARNODY,
Commissioner of the Fire Department
of the City of Chicago; WILLIAM J.
COMPTON, Chief Vice Marshal of the
City of Chicago; RICHARD J. COLLIER,
JOSEPH E. GRANT, and ALBERT O. ANDERSON,
Members of the Civil Service Commission
of the City of Chicago; ALVIN E. KRAMER,
Treasurer of the City of Chicago; and
E. DUNHAM, Comptroller of the City of
Chicago.

Appellees.

CHICAGO COUNTY,
SOUTHERN DISTRICT.

2791A.03

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff instituted his proceedings in the Superior

Court of Cook County in mandamus seeking a writ to compel the

defendants, City of Chicago, James H. Hancock, Mayor of the City

of Chicago, Daniel J. Garnody, Commissioner of the Fire Department,

the Civil Service Commissioners of the City of Chicago, and others,

to certify positions to the position of Captain of the Fire Department

most of the City of Chicago. This petition was filed July 6, 1935,

and a general demurrer was interposed by the defendants. The

demurrer was sustained by the trial court and an appeal from that

order taken to this court.

The essential facts set forth in the petition seeking

the writ alleges that the petitioner John entered the service

of the city as a fireman in the fire department on August 1, 1911,

and was subsequently promoted to the rank of lieutenant in the

classified service of that department; that a promotional examination was held by the Civil Service Commission for the position of captain and on August 30, 1929, the eligible list of successful candidates was posted and that petitioner was on said list as one of the successful candidates.

On April 14, 1931, he was Number 1 on said eligible list and that at that time there were three vacancies in the position of captain in the classified service; that on September 3, 1931, this list was canceled and the three vacancies which existed at the time were not filled as required by the Civil Service Law and the regulations of the Civil Service Commission, but were permitted to remain vacant.

Defendants contend in support of their demurrer that the petition shows on its face that the eligible list was canceled more than two years after it was posted and that by reason thereof the list became ineffective and the petitioner left without any enforceable right. It is also contended by the defendants that on the face of the petition it appears that the plaintiff was guilty of laches inasmuch as his petition was not filed until July 6, 1933, one year and ten months after the eligible list, upon which petitioner's name appeared, had been canceled.

The first proposition was considered and passed upon by the second division of this court in the case of People ex rel Lynch v. City of Chicago, 271 Ill. App. 360. In its opinion in that case the court said:

"And we are of the opinion that the well-pleaded facts, as alleged in the petition, are not sufficient to warrant the court's judgment, which commands the present civil service commissioners 'to forthwith certify from the eligible list posted December 24, 1927, * * * the name of Michael J. Lynch * * * for the office or position of sergeant of police,' etc. In the 11th

classified service of that department; that a promotional examination was held by the Civil Service Commission for the position of captain and on August 30, 1933, the eligible list of successful candidates was posted and that petitioner was on said list as one of the successful candidates.

On April 14, 1931, he was Number 1 on said eligible list and that at that time there were three vacancies in the position of captain in the classified service; that on September 3, 1931, the list was canceled and the three vacancies which existed at the time were not filled as required by the Civil Service Law and the regulations of the Civil Service Commission, but were permitted to remain vacant.

Defendants contend in support of their demurrer that the petition shows on its face that the eligible list was canceled more than two years after it was posted and that by reason thereof the list became ineffective and the defendant was without any recourse while right. It is also contended by the defendants that on the face of the petition it appears that the defendant was not on the list inasmuch as his petition was not filed until July 8, 1932, one year and ten months after the eligible list, upon which petitioner's name appeared, had been canceled.

The first proposition was considered and passed upon by the second division of this court in the case of People ex rel. Planch v. City of Chicago, 271 Ill. App. 380. In its opinion in that case the court said:

"And we are of the opinion that the well-pleaded facts, as alleged in the petition, are not sufficient to warrant the court's judgment, which commands for present civil service commission to be dissolved and fifty from the eligible list posted December 22, 1931, * * * the name of Michael J. Planch * * * for the office or position of sergeant of police, etc., in the list

paragraph of the petition it is alleged that the eligible list, as posted on said date, 'was canceled on January 2, 1930' (i.e. more than two years after it was posted, and more than a year before petitioner filed the present petition). Because of a provision contained in section 10 of the 'Act to regulate the civil service of cities' (Cahill's St. ch. 24, Par. 694) it is apparent that said cancellation of the list was lawful and proper. The provision is: 'Said commission may strike off names of candidates from the register after they have remained thereon more than two years.' We think that when said old eligible list was canceled it became functus officio, that is, it 'had become of no virtue whatsoever' (8 Bouvier's Dict., Rawle's 3rd ed. p. 1323), and petitioner's name, not being on any list, could not legally be certified by the commission for the position of sergeant."

We agree with the views expressed in that opinion.

The fact that there was a vacancy at the time the list was canceled, in our opinion, does not vitiate the right of the Civil Service Commission to cancel the list and to require a new examination. There may have been very good reasons for not filling the vacancy. It may have been for financial reasons and the desire to make retrenchments in the cost of government. The matter of cancellation was one within the power of the Civil Service Commission and we will not interfere with the discretionary right of the Civil Service Commission to take such action.

The delay in filing the petition is sought to be excused by the petitioner for the reason that his delay was caused by the statements of Anton J. Cermak, then Mayor of the City, to the effect that he, Cermak, would see to it that the petitioner was certified to the rank of captain, but that Cermak died before correcting the alleged wrong to the petitioner. There was no inherent power in the mayor to bring about the promotion of petitioner, as this was a matter coming under the cognizance of the Civil Service Commission, in conjunction with the head of the particular department. If he had any rights he should have acted promptly in his attempt to

secure them. One claiming a right to a position under Civil Service should act promptly so as not to disarrange the service nor allow rights of others to intervene.

It is insisted that laches does not apply to a proceeding of this character, but that the cases quoted and relied upon by the defendants showing that the question of laches may be raised, are found upon examination to be those predicated upon applications for certiorari. We believe, however, that the question may be raised in a mandamus proceeding where public office is involved as well as to a petition for a writ of certiorari.

In the case of People ex rel Lynch v. City of Chicago, supra, the court in its opinion, said:

"It is decided in this State that in a mandamus proceeding the defense of laches, appearing on the face of the petition, may be raised by demurrer. (Schultheis v. City of Chicago, 240 Ill. 167, 170; Kenneally v. City of Chicago, 220 Ill. 485, 503, 503."

The same question was passed upon in the case of Schultheis v. City of Chicago, 240 Ill. 167, and it was there held that laches could be raised in a proceeding in mandamus.

We believe that the second position taken by defendants, namely that the petitioner was guilty of laches, is well founded. A writ of mandamus is not a matter of absolute right. The court still has a right to ~~exercise~~ its discretion in ordering the writ and if the right is doubtful it may be refused. Kenneally v. City of Chicago, 220 Ill. 485. The reason offered for the delay in the filing of the petition is not sufficient in our opinion to justify the action of the petitioner in delaying his application for the writ.

secure them. The granting a writ to a petition under civil service should not necessarily be as not to disturb the service not allow rights of others or interests.

It is insisted that Jacobson does not apply to a proceeding of this character, but that the cases quoted and relied upon by the defendant showing that the question of Jacobson may be raised, are based upon examination to be taken provided upon applications for certiorari. We believe, however, that the question may be raised in a mandamus proceeding where public office is involved as well as in a petition for a writ of certiorari.

In the case of People ex rel. Lynch v. City of Chicago, supra, the court in its opinion, said:

"It is decided in this case that in a mandamus proceeding the defense of Jacobson, appearing on the face of the petition, may be raised by demurrer. (Abraham v. City of Chicago, 250 Ill. 423, 80 S. 2d 117, 120; Kennedy v. City of Chicago, 250 Ill. 423, 80 S. 2d 117, 120.)"

The same question was raised upon in the case of Abraham v. City of Chicago, 250 Ill. 423, 80 S. 2d 117, and it was there held that Jacobson could be raised in a proceeding in mandamus.

We believe that the second position taken by defendant, namely that the petitioners are guilty of Jacobson, is well founded. A writ of mandamus is not a matter of absolute right. The court still has a right to exercise its discretion in granting the writ and its right is doubtful as may be returned. (Kennedy v. City of Chicago, 250 Ill. 423, 80 S. 2d 117, 120.) The reason offered for the delay in the filing of the petition is not sufficient in our opinion to justify the action of the petitioner in delaying its submission for the writ.

For the reasons stated in this opinion the action of the trial court in sustaining the demurrer to the petition is approved and the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

1

The reasons stated in this opinion the court
at the time was in sustaining the demurrer to the petition
is stated that the judgment of the superior court is affirmed.

JUDGMENT AFFIRMED.

WILLIAM L. L. AND LARRY J. CONGER.

37678

42
7
WILLIAM MOISANT, for use of
CRESCENT FURNITURE COMPANY, a
corporation,

(Plaintiff) Appellee,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 624⁵

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action by William Moisant, for use of the Crescent Furniture Company, a corporation, against the John Hancock Mutual Life Insurance Company, a corporation, on an assignment of wages. There was a trial before the court without a jury, resulting in a finding against the defendant for the sum of \$225.79, and judgment was entered on the finding. From this judgment an appeal was perfected to this court.

Moisant testified that he was in the employ of the defendant corporation on July 31, 1929, and continued in its employ until August 1930; that he received \$20 a week and commission; that he was paid in cash; that when they, the agents, were short the company would pay them and that when they had collected more than the \$20 and commission the corporation would take the balance left over the amount due them.

Defendant insists that from this evidence it appears that the company did not owe Moisant at the end of each week, but that Moisant owed the company. The trial court found otherwise and we agree with the finding. The matter of payment was only a matter of bookkeeping, but it is apparent that the arrangement between

WILLIAM MOISANT, for use of
GREENSBORO FURNITURE COMPANY,
Defendant.

(Plaintiff) Appellant.

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,
(Defendant) Appellant.

OF OHIO.

27873, A. 624

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action by William Moisant, for use of the
Greensboro Furniture Company, a corporation, against the John Hancock
Mutual Life Insurance Company, a corporation, on an assignment of
wages. There was a trial before the court without a jury, result-
ing in a finding against the defendant for the sum of \$250.75, and
judgment was entered on the finding. From this judgment an appeal
was perfected to this court.

Moisant testified that he was in the employ of the
defendant corporation on July 31, 1929, and continued in its employ
until August 1930; that he received \$20 a week and commission; that
he was paid in cash; that when they, the agents, were about the
company would pay them and that when they had collected more than
the \$20 and commission the corporation would take the balance left
over the amount due them.

Defendant insists that from this evidence it appears that
the company did not owe Moisant at the end of each week, but that
Moisant owed the company. The trial court found otherwise and we
agree with the finding. The matter of payment was only a matter
of bookkeeping, but it is apparent that the arrangement between

Moisant and the defendant company was to the effect that he was to receive \$20 a week. If he did not collect anything, then the company was compelled to pay it.

After the receipt of the notice of the assignment of wages, the company should have withheld payment of the salary and commission due. The moneys collected did not belong to Moisant, but to the company.

It is insisted that the plaintiff has not complied with the section of the Practice Act in regard to the bringing of the action. This section provides that an assignee may bring suit in his own name if he complies with the provisions of the statute. This case, however, is brought in the name of the assignor for use of the plaintiff and the statute is, therefore, not applicable. Hugo Hartnack for use of Dr. Hartnack Exterminating Service, Inc., Appellee, v. The Board of Charities of the Illinois Conference of the Ev. Lutheran Augusta Synod, Appellant, 267 Ill. App. 606.

No objection was made at the trial to the pleadings and, therefore, objections cannot be raised here.

We see no reason for disturbing the judgment of the trial court and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

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After the receipt of the notice of the assignment of wages, the company should have withheld payment of the salary and commission due. The money collected did not belong to Moient, but to the company.

It is insisted that the plaintiff has not complied with the section of the Practice Act in regard to the bringing of the action. This section provides that an assignee may bring suit in his own name if he complies with the provisions of the statute. This case, however, is brought in the name of the assignor for use of the plaintiff and the statute is, therefore, not applicable. Under authority for use of Mr. Herbert L. Hargrave, Esq., Attorney at Law, 100 N. 1st St., St. Paul, Minn.

No objection was made at the trial to the pleadings and, therefore, objections cannot be raised here.

We see no reason for disturbing the judgment of the trial court and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

WILLIAM A. HARRIS, J. CLERK.

37706

CHRIST ANSCHUTZ,

(Plaintiff) Appellee,

v.

CHARLES GABEL, SR.,

(Defendant) Appellant.

43
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

279 I.A. 625¹

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment against Charles Gabel, Sr. because of injuries sustained on the night of October 22, 1933, when it was claimed he was struck by an automobile driven by the minor son of the defendant. The son, Charles Gabel, Jr., was originally a defendant but was dismissed from the case at the end of the proceedings.

The original declaration charged that the accident happened while the plaintiff was crossing St. Charles Road in a southerly direction at or near its intersection with 14th avenue in Maywood, Cook County, Illinois.

January 31, 1934, three additional counts were filed by leave of court again charging that plaintiff was crossing St. Charles Road at or near 14th avenue at the time of the accident.

March 20, 1934, additional counts were filed by leave of court. The first of these counts charged that the plaintiff was walking in an easterly direction across 14th avenue at its intersection with St. Charles Road; that the automobile of the defendant was driven carelessly, negligently and improperly and that the driver of the defendant's automobile failed to keep an outlook for persons using the highway and that by reason thereof the automobile ran against the plaintiff and injured him.

The second additional count charges that plaintiff was walking in an easterly direction across 14th avenue at its intersection

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Dr. because of injuries sustained on the night of October 22, 1932, 1932.

which is not claimed to be a record of an individual's life.

—Last son of the defendant. The son, Charles Cabell, Jr., was originally

A defendant has been identified that the FBI is currently investigating.

• 1975-1976

Final decision charged that the accident happened

While the subject was crossing St. Charles Road in a southerly

Intersection of 14th Avenue in New York.

over coming, Illinois.

January 31, 1984, three additional counts were filed by

... và những người khác đã được đưa ra khỏi vùng bị ảnh hưởng của cơn bão.

and it is not until about 1945 that the first of these is mentioned in the records of the FBI.

March 26, 1954, additional counts were filed by leave of

court. The first of these counts charged that the plaintiff was

walking in an easterly direction across 14th Avenue at its intersection

with St. Charles Road; that the automobile of the defendant was

To remind our staff that we are a part of the community, we have decided to

the defendant's automobile failed to keep an outlook for persons

using the highway and that by reason thereof the automobile ran

against the plaintiff and injured him.

The second addition to the original report was made on 10/10/1964.

relating to an allegedly fraudulent scheme that resulted in the loss of approximately \$100,000.

with St. Charles Road and was in the exercise of due care for his own safety; that Charles Gabel, Sr. was the owner of an automobile driven by his servant Charles Gabel, Jr., in a northerly direction on 14th avenue; that defendants carelessly, negligently and improperly operated and drove the automobile and failed to have it equipped with proper brakes and that by reason thereof it ran into and injured the plaintiff.

These two counts charged general negligence. There is no evidence, however, as to the condition of the brakes.

At the end of plaintiff's case all the counts except the first, second and third additional counts filed March 30, 1934, were stricken on motion of defendant. The third additional count, however, charges that the plaintiff was walking across St. Charles Road and not across 14th avenue as the proof shows.

Considerable stress is placed upon the fact that the original declaration charged that he was crossing St. Charles Road and that it was not until a considerable time after the filing of the original declaration that this allegation was changed, so as to make it appear that he was crossing 14th avenue. This may be accounted for, however, by reason of the fact that plaintiff was so severely injured and was in the hospital for seven months and over, suffering from injuries to the leg and head.

From the medical evidence it appears that the head injury sustained by the plaintiff created a condition of amnesia and that the happenings just prior to the brain concussion might not have become clear for some considerable time after the injury.

Upon the trial plaintiff testified that on the night of the accident he left his house between 7 and 8 o'clock, crossed St. Charles Road at 15th avenue and walked east on the south side of St. Charles Road as far as 14th avenue; that there was a stop sign on the east

with St. Charles Road and was in the exercise of due care for his own safety; that Charles Cabell, Sr. was the owner of an automobile driven by his servant Charles Cabell, Jr., in a northerly direction on 14th Avenue; that defendant carelessly, negligently and improperly operated and drove the automobile and failed to have it equipped with proper brakes and that by reason thereof it ran into and injured the plaintiff.

These two counts charged general negligence. There is no evidence, however, as to the condition of the brakes. At the end of plaintiff's case all the counts except the first, second and third additional counts filed March 30, 1934, were stricken on motion of defendant. The third additional count, however, charges that the plaintiff was walking across St. Charles Road and not across 14th Avenue as the word shows.

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From the medical evidence it appears that the head injury sustained by the plaintiff caused a condition of affairs not that the happenings just prior to the brain concussion might not have become clear for some considerable time after the injury.

Upon the trial plaintiff testified that on the night of the accident he left his house between 7 and 8 o'clock, crossed St. Charles Road at 14th Avenue and walked east on the south side of St. Charles Road as far as 14th Avenue; that there was a dark spot on the road

side of 14th avenue, facing south and that he was familiar with the conditions surrounding the intersection at that place; that when he got to 14th avenue he was crossing in an easterly direction, and observed a car approaching from the south, that the car was between 50 and 70 feet away; that he had reached a point six or seven feet from the west curb when he was struck; that immediately thereafter he lost consciousness and did not remember anything more.

Charles Gabel, Jr., the driver of the car and the son of Charles Gabel, Sr., the owner of the car, testified that he was 17 years of age and that his left eye had been removed but that the vision of his right eye was good and that he could see without glasses; that he used glasses for small objects at a distance and for reading; that on the night of the accident he had his glasses on. He testified further that on the night of the accident he was driving east on St. Charles Road; that at no time was he driving north on 14th avenue; that on the night in question it was dark and raining hard; that both the headlights on the automobile were burning and that the windshield wiper was working; that there were two automobiles coming west on St. Charles Road and that he was driving at about 20 miles an hour and could see about 40 or 50 feet ahead of him; that the first he knew about any accident occurring was when he was about in the middle of the block between 13th and 14th avenues and driving east on St. Charles Road; that he heard a crash of glass on his left; that he heard his car fan clicking; that he pulled over to the curb and got out and looked at the front end of his car and saw the left headlight was bent back, the glass shattered and the shell of the left side of the radiator was dented; that after he looked at the front of the automobile, he noticed several people 40 or 50 feet behind him and saw a man lying on the street just south of the line that went down the middle of the street; that there was a street light at the south-

side of 14th Avenue, facing south and that he was familiar with the conditions surrounding the intersection at that place; that when he got to 14th Avenue he was crossing in an easterly direction, and observed a car approaching from the south, that the car was between 50 and 70 feet away; that he had reached a point six or seven feet from the west curb when he was struck; that immediately thereafter he lost consciousness and did not remember anything more.

Charles Gabel, Jr., the driver of the car and the son of Charles Gabel, Sr., the owner of the car, testified that he was 17 years of age and that the last time he was licensed was about the

violin of his right eye was good and that he could see without glasses; that he used glasses for small objects at a distance and for reading; that on the night of the accident he had his glasses on. He testified

further that on the night of the accident he was driving east on St. Charles Road; that at no time was he driving north on 14th Avenue; that on the night in question it was dark and raining hard; that both

the headlights on the automobile were burning and that the windshield wiper was working; that there were two automobiles coming west on St. Charles Road and that he was driving at about 25 miles an hour

and could see about 40 or 50 feet ahead of him; that the first he knew about any accident occurring was when he was about in the middle of the block between 13th and 14th Avenues and driving east on St.

Charles Road; that he heard a crash on his left; that he heard his car fan clicking; that he pulled over to the curb and got out and looked at the front end of his car and saw the left headlight

was bent back, the glass shattered and the shell of the left side of the radiator was bent; that after he looked at the front of the automobile, he noticed several people 40 or 50 feet behind him and

saw a man lying on the street just south of the line that went down the middle of the street; that there was a street light at the north-

west corner of 14th avenue; that he went to a telephone and called up his father; that he rode over with his father and the police lieutenant to the police station where he made a report of the accident.

Edward Koch, a witness called on behalf of plaintiff, testified that he was lieutenant of police of Maywood and had been for 12 years; that 14th avenue does not cross St. Charles Road; that there was a stop sign at its intersection with that highway; that when he arrived at the scene of the accident he saw an automobile standing on St. Charles Road about 8 feet west of 13th avenue and on the south side of the street next to the curb; it was headed in a diagonal direction; that the left headlight was broken and there was a dent at the top of the radiator; that he saw a man lying about the middle of St. Charles Road, about 125 feet east of 14th avenue; that he talked with Charles Gabel, Jr. about three minutes after his arrival at the place in question and asked him if he knew what he had hit and he replied that he did not; that he asked him where he was coming from and he replied that "he was coming from getting a gun for his father"; that Charles Gabel, Jr., told him that his windshield wiper was not working.

Edward C. Feldman, a witness called on behalf of the plaintiff, testified that he was a sergeant of police for the Village of Maywood; that on October 23, 1932, about 2:30 in the afternoon he with Bailey, the Chief of Police of Maywood, examined the place where the accident happened; that Bailey picked up several pieces of glass from the pavement on the St. Charles Road and handed them to him and he placed them in an envelope; that he and Bailey went to the home of Mr. Gabel, Sr. and that Bailey took the pieces of glass and placed them inside the reflector of the left headlight of the automobile, which was a Chevrolet, and that Mr. Gabel, Jr. said that it looked to him like the same glass, meaning the same glass as

west corner of 14th Avenue; that he went to a telephone and called
up his father; that he rode over with his father and the police
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where the accident happened; that Bailey picked up several pieces of
glass from the pavement on the St. Charles Road and handed them to
him and he placed them in an envelope; that he and Bailey went to
the home of Mr. Gabel, Sr., and that Bailey took the pieces of glass
and placed them inside the reflection of the left headlight of the
automobile, which was a Chevrolet, and that Mr. Gabel, Jr., said
that it looked as if like the same glass, meaning the same glass as

that in the headlight of the Chevrolet.

Robert H. Bailey, a witness called on behalf of the plaintiff, testified he was the Chief of Police of Maywood and that he talked with Charles Gabel, Jr. at the police station and asked him if he knew he had hit a man and that he replied that he did not know it until he got out of his car; that he, Bailey, then went out of the police station and looked at the automobile and found the left front headlight was bent back and the glass broken and the shell of the radiator caved in; that the shell of the horn on the front was bent; that he asked Charles Gabel, Sr. if his son had permission to use the car and Gabel replied that he did; that he asked Gabel, Sr. where the boy had been with the car and Gabel replied that he had sent him on an errand for him at 19th avenue and St. Charles Road; that the glass which he picked up from the street was 15 feet or so east of the east crosswalk of 14th avenue and just south of the center line of St. Charles Road.

Defendant insists that there is no evidence to support the allegation to the additional counts to the effect that defendant's automobile was proceeding north on 14th avenue and struck the plaintiff while he was crossing the 14th avenue crosswalk from west to east. This statement does not receive support from the record. The plaintiff testified positively on direct examination that he was in the act of crossing 14th avenue in an easterly direction at the time he was struck. Charles Gabel, Jr. testified that he was proceeding east on St. Charles Road and was not on 14th avenue, but that fact was one for the jury to determine.

The driver of the automobile in his testimony admitted that he heard a crash. The condition of his automobile showed that it must necessarily have come in contact with some object while proceeding at considerable speed. The only thing that could have been struck

that in the headlights of the Chevrolet.

Robert H. Bailey, a witness called on behalf of the plain-

tiff, testified he was the Chief of Police of New York and that he talked with Charles Gabel, Jr. at the police station and asked him if he knew he had hit a man and that he replied that he did not know it until he got out of his car; that he, Bailey, then went out of the police station and looked at the automobile and found the left front headlight was bent back and the glass broken and the shell of the radiator caved in; that the shell of the horn on the front was bent; that he asked Charles Gabel, Sr. if his son had permission to use the car and Gabel replied that he did; that he asked Gabel, Sr. where the boy had been with the car and Gabel replied that he had sent him on an errand for him at 12th Avenue and St. Charles Road; that the glass which he picked up from the street was 13 feet or so east of the east crosswalk of 14th Avenue and just south of the center line of St. Charles Road.

Defendant insists that there is no evidence to support the allegation to the additional counts to the effect that defendant's automobile was proceeding north on 14th Avenue and struck the plaintiff while he was crossing the 14th Avenue crosswalk from west to east. This statement does not receive support from the record. The plaintiff testified positively on direct examination that he was in the act of crossing 14th Avenue in an easterly direction at the time he was struck. Charles Gabel, Jr. testified that he was proceeding east on St. Charles Road and was not on 14th Avenue, but that fact was for the jury to determine.

The driver of the automobile in his testimony admitted that he heard a crash. The condition of his automobile showed that it was traveling fast and it is probable that it was still traveling at considerable speed. The only thing that could have been struck

was the plaintiff. There is no evidence of a collision with any other object.

We believe that it was competent for the witness Bailey to testify that he found glass at or near the intersection of St. Charles Road and 14th avenue and that from appearances it belonged to the broken headlight on the car in question, particularly, as it was similar to the glass in the other headlight. The fact that it was not picked up until about 18 hours after the accident would only go to the weight of the evidence. The whole question was one of fact for the jury and we have no reason for disturbing the verdict inasmuch as it has been concurred in by the trial court in overruling a motion for a new trial and entering judgment thereon.

The admission of Charles Gabel, Jr., to the effect that he was on an errand for his father, coupled with the testimony of Bailey to the effect that Charles Gabel, Sr. had stated to him that his son had gone on an errand for him, was sufficient to fasten the liability upon the father as the owner of the car, if the jury believed this evidence to be true. The admissions were properly admissible in evidence. Spies v. Sussman, 264 Ill. App. 528.

Gabel, Sr. testified in his own behalf that his son had gone to 18th avenue and St. Charles Road to borrow a shot gun in order to go hunting with him the following day, but it is not clear from his testimony as to whether he sent the boy on this errand or whether the boy went on his own account.

Plaintiff argues that from the evidence it is apparent that Gabel, Jr. was driving north on 14th avenue and did not stop at the through street known as St. Charles Road, but swung in an easterly direction over this second thoroughfare, striking the plaintiff while the automobile was in the act of turning and carrying him a considerable distance east on St. Charles Road; that the driver

was the plaintiff. There is no evidence of a collision with any other object.

We believe that it was competent for the witness Bailey to testify that he found glass of or near the intersection of St. Charles Road and 14th Avenue and that from appearances it belonged to the broken headlight on the car in question, particularly as it was similar to the glass in the other headlight. The fact that it was not picked up until about 18 hours after the accident would

only go to the weight of the evidence. The whole question was one of fact for the jury and we have no reason for disturbing the verdict inasmuch as it has been corroborated in by the trial court in

overruling a motion for a new trial and without judgment thereon.

The admission of Charles Cabell, Sr., as the father of

is not an error for his father, coupled with the testimony of Bailey to the effect that Charles Cabell, Sr., had stated to him that

his son had come on an errand for him, was sufficient to sustain the liability upon the father as the owner of the car. At the time

related the evidence to be true. The admissions were properly admitted in evidence. Charles W. Buchanan, 284 Ill. App. 283.

Cabell, Sr., testified in his own behalf that his son had gone to 14th Avenue and St. Charles Road to borrow a shot gun in

order to go hunting with him the following day, but it is not clear from his testimony as to whether he sent the boy on this errand or whether the boy went on his own account.

Plaintiff argues that from the evidence it is apparent that Cabell, Sr., was driving north on 14th Avenue and did not stop at the through street known as St. Charles Road, but swung in an

errand directly over this second intersection, claiming the plaintiff while the automobile was in the act of turning and carrying

him a considerable distance east on St. Charles Road; that the driver

of the car was negligent in not stopping, although there was a stop sign at this intersection. It is also insisted that the driver was on the wrong side of 14th avenue in proceeding north, inasmuch as he struck the plaintiff who was but a few feet from the westerly curb of 14th avenue; that the fact that it was dark and raining and the driver had an impaired vision, created a condition which would have required a more vigilant outlook than was exercised by Gabel, Jr. in the operation of his automobile.

Defendant insists that the plaintiff was negligent inasmuch as he saw the car approaching and did not exercise ordinary care for his own safety.

All these were questions of fact which required the submission of the case to the consideration of the jury.

There was no error in the giving of the instructions complained of. The jury have the right to consider the circumstances surrounding a case as well as the testimony of eye witnesses.

We find no reversible error in the record and for the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

of the car was negligent in not stopping, although there was a stop sign at this intersection. It is also insisted that the driver was on the wrong side of 14th avenue in proceeding north, inasmuch as he struck the plaintiff who was but a few feet from the westerly curb of 14th avenue; that the fact that it was dark and raining and the driver had an impaired vision, created a condition which would have required a more vigilant outlook than was exercised by Gabel, Jr. in the operation of his automobile.

Defendant insists that the plaintiff was negligent inasmuch as he saw the car approaching and did not exercise ordinary care for his own safety.

All these were questions of fact which required the submission of the case to the consideration of the jury. There was no error in the giving of the instructions complained of. The jury have the right to consider the circumstances surrounding a case as well as the testimony of eye witnesses. We find no reversible error in the record and for the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

THOMAS J. BROWN,

Attorney at Law, St. Louis, Mo.

37667

RICHARD L. WILLIAMS,
Appellant,

vs.

ABRAHAM J. HENNINGS, Trustee,
Appellee.

48
APPEAL FROM CIRCUIL COURT
OF COON COUNTY.

279 I.A. 625²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

December 19, 1929, Richard L. Williams filed his bill to foreclose a trust deed dated June 1, 1925, given to secure an indebtedness of \$51,850, evidenced by a series of notes. Abraham J. Hennings, trustee, was made a party defendant. He answered the bill and on August 19, 1932, filed his cross bill to foreclose a trust deed dated August 15, 1926, on the same premises, given to secure an indebtedness of \$125,000. The cause was referred to a master, who took the evidence and found that the Hennings trust deed was a lien on the premises prior to the lien of the Williams trust deed. A decree was entered in accordance with the report of the master, and Williams prosecutes this appeal, contending that the lien of his trust deed was prior to that of Hennings.

Counsel for Williams in their brief say, "The sole question in this case is that of the priority of a mortgage junior in point of time and record to one senior in point of time and record."

The record discloses that the Williams trust deed recites that the lien created by it is subordinate to the liens of two prior trust deeds, one dated October 19, 1921, which was given to secure an original indebtedness of \$70,000; and the other dated December 1, 1923, given to secure an original indebtedness of \$85,000. The Williams trust deed states, "THIS IS A JUNIOR MORTGAGE;" and further, "for the purpose of paying off either of the encumbrances secured by the two Trust Deeds above mentioned, *** the Grantors herein reserve the right to incumber said premises with a new Trust Deed as

during the payment of a sum not exceeding the amount of the incumbrances so paid off *** providing however, the funds derived therefrom shall be used in paying off said existing incumbrance which shall be duly released of record and to which new incumbrance this Trust Deed shall be subordinated."

Williams in his bill claimed that Note No. 40 of the series, for \$36,260, was due and unpaid. On the face of the note appeared the following: "THIS NOTE IS SECURED BY A JUNIOR MORTGAGE."

The master found that there was due Williams for principal, interest, costs, solicitor's fees, etc., \$48,900.00. He further found that there was due on the indebtedness secured by the Jennings trust deed for the principal, interest, costs, etc., \$138,566.78. The amounts secured by the first and second trust deeds, which were prior in point of time to the Williams trust deed, became due and payable before the indebtedness secured by the Williams trust deed, and in 1936 the then owners of the property procured a loan through Peabody, Houghteling & Co., to enable them to pay off the balance due on the first and second mortgages. For this purpose a \$138,000 bond issue was prepared by Peabody, Houghteling & Co. and sold to the public. The Jennings trust deed secured payment of this issue. The master found that the \$138,000 realized from the bond issue was disbursed as follows: amount remaining due on first mortgage with interest, \$72,125.00; amount remaining due on second mortgage with interest, \$45,990.00; paid Peabody, Houghteling & Co. a commission of 5% on the \$138,000.00 bond issue, which included expenses for engraving bonds, cost of survey, releases, etc., \$6,880.00; "On account of rebate of interest \$835.50. *** Principal paid to Mr. and Mrs. Saunders \$92.80 (the owners of the property,) making a total of \$123,000."

The chancellor found in accordance with the findings of the master that the Jennings trust deed was a lien on the premises prior

to the indebtedness secured by the Williams trust deed.

Counsel for Williams states that the only fact in dispute is the contention of Hennings that Oscar C. Hagen, who owned the note prior to the time it was acquired by complainant and prior to the making of the Hennings trust deed, orally agreed that in case a loan were made by the owners of the premises to pay off the first and second mortgages, he would subordinate his mortgage to the lien of the new trust deed.

R. H. Krammes, called by Hennings, testified that he was associated with Peabody, Houghteling & Co.; that in 1936 he had dealings with Sanders, who owned the premises, concerning a loan of \$125,000 to be secured by a trust deed, the proceeds of which should be used to pay off the first and second mortgages on the premises; that shortly after Peabody, Houghteling & Co. agreed with the owners to make the loan, he talked to Oscar C. Hagen who then owned the notes secured by the Williams trust deed and advised him as to what was being done, and asked Hagen to subordinate the loan of the trust deed securing the notes owned by Hagen to the new trust deed which was to be executed securing the new loan, and that Hagen agreed to this; that afterward the \$125,000 bond issue and trust deed were executed, the bonds sold, and the proceeds used to pay off the two prior mortgages on the premises, and he then called again on Hagen to have the oral agreement carried out but Hagen refused to do so, stating that the new mortgage was too large.

Oscar C. Hagen, called by complainant, testified that some one came to him from Peabody, Houghteling & Co., concerning the making of a new mortgage on the premises and asked him to subordinate the lien of his trust deed to that of the proposed new trust deed and that he refused to do so, except "as I would be governed by the terms of the trust deed." He further testified that the Peabody, Houghteling & Co. representative then offered him \$3000

to the indebtedness incurred by the Williams trust deed.

Witness the Williams trust deed, this 1st day of January

in the year of our Lord one thousand eight hundred and

eighty-nine, at the time it was executed by the parties and before

the signing of the Williams trust deed, orally agreed that the

same were made by the owners of the premises to pay off the first

and second mortgages, he would subordinate his mortgage to the first

of the new trust deed.

M. E. Williams, called by Williams, testified that he was

associated with the Williams, Manufacturing & Co.; that in 1888 he had

deposited with Williams, Manufacturing & Co., a sum of money

of \$100,000, to be secured by a trust deed, the proceeds of which

should be used to pay off the first and second mortgages on the

premises; that shortly after January 1, 1889, he agreed with

the owners to make the loan, he failed to secure C. Rogers and then

owed the notes secured by the Williams trust deed and advised him

as to what was being done, and asked Rogers to subordinate the loan

of the trust deed securing the notes owned by Rogers to the new

trust deed which was to be executed securing the new loan, and that

Rogers agreed to this; that afterward the Williams trust deed was

first deed were executed, the bonds sold, and the proceeds used to

pay off the two other mortgages on the premises, and he then called

again on Rogers to have the trust agreement carried out and Rogers re-

plied to him, stating that the new mortgage was too large.

Witness the Williams trust deed, this 1st day of January

in the year of our Lord one thousand eight hundred and

eighty-nine, at the time it was executed by the parties and before

the signing of the Williams trust deed, orally agreed that the

same were made by the owners of the premises to pay off the first

and second mortgages, he would subordinate his mortgage to the first

of the new trust deed.

M. E. Williams, called by Williams, testified that he was

associated with the Williams, Manufacturing & Co.; that in 1888 he had

in cash to subordinate the lien of the trust deed as stated, but that he refused to do so.

The master in his report commented on this conflict in the testimony of the two witnesses, and in the light of all the evidence he found that the testimony of Krammes was the more credible, and he found the facts as testified to by that witness.

Complainant Williams contends that "Under the law of subrogation, the trustee Hennings (representing the bondholders) has no right to even claim subrogation in this case. If anyone could, only Peabody, Houghtaling could do so." We think this contention cannot be sustained. The agreement of the parties, as found by the master, was that the lien of the Williams trust deed was to be subordinated to the lien of the Hennings trust deed. The proceeds obtained from the sale of the \$128,000 bond issue was used to pay off the first and second mortgages that were due and were a prior lien to the Williams trust deed. In other words, the \$128,000 was used to prevent the first and second mortgages going into default. Moreover, the Williams trust deed expressly provided that if funds were obtained to pay off the two mortgages, which were prior to the Williams mortgage, the Williams trust deed would be subordinated to the new trust deed given to secure the payment of the money with which to pay off the first and second mortgages. In these circumstances it would be highly inequitable to hold that the lien of the Williams trust deed was superior to that of the Hennings trust deed.

But complainant, Williams, further contends, as we understand the argument, that in no event should the Hennings trust deed be held to be a prior lien for the amount of the indebtedness represented by the two first mortgages, because the Williams trust deed expressly provides that it is to be subordinated only to one or the other of the trust deeds securing the two first mortgages and not to both of them, because the trust deed expressly provides: "For the purpose

[illegible]

of paying off either of the incumbrances secured by the two Trust Deeds above mentioned," the granters reserved the right to encumber the premises with a new trust deed, which was to be a prior lien to the Williams trust deed. We think there is no merit in this contention. While the word "either" might throw some doubt on the question, yet upon a reading of the entire provision of the trust deed it is obvious that it was the intention of the granters, in case they borrowed money with which to pay off the two first mortgages, that the trust deed securing such indebtedness would be prior to the lien of the Williams trust deed, because the trust deed provided that the granters reserved the right to encumber the premises with a new trust deed "securing the payment of a sum not exceeding the amount of the incumbrance so paid off." This obviously applied to one or both of the two prior trust deeds.

Complainant makes the further point, "That under no stretch of the imagination should the Hennings' second mortgage be found in fact to be ahead of the Williams' first mortgage because only \$118,118.00 thereof was used to retire the first and second released mortgages and interest thereon, and that, therefore, regardless of anything, Williams should have been decreed to be ahead of the Hennings second mortgage to the extent of the difference between \$118,118.00 and \$125,000.00, or \$6,882.00.

"(a) That certainly, the amount of \$1,793.58, which was paid to the owners of the premises out of the Hennings' second mortgage, thereby subordinating Williams' mortgage to a larger amount than necessary, should have been paid to the complainant." We think there is no merit in this contention.

The master itemized the way in which the \$125,000 was disbursed, as above set forth. After paying the amount due on the first and second mortgages, \$6,250 was paid to Feabody, Boughteling & Co. for commissions, which included the engraving of the bonds, cost of survey, releases, etc. We are not certain whether this

item is objected to by complainant, but we think the expenditure was entirely proper because it is obvious that anyone borrowing \$125,000 to be secured by a mortgage would have to pay a commission for obtaining the loan and for performing other necessary services. The master's itemization shows that but \$536.50 was rebated to the owners of the property, not \$1293.86, as seems to be contended by complainant. This rebate was made to the borrowers to cover interest between the date of the bonds and the actual time when the money was advanced. We think this item was proper, under the circumstances.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Hatchett, JJ., concur.

37736

MARCELA YURCEL, Adm'x of the
Estate of Joseph Skabitski,
Appellee,

vs.

THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 625³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$500, the face of an insurance policy issued by defendant to Joseph Skabitski. There was a jury trial, a verdict and judgment in plaintiff's favor for the amount of her claim, and defendant appeals.

The record discloses that June 25, 1931, Joseph Skabitski made application to defendant for life insurance. A medical examination was required for the particular kind of policy for which he applied. Four days later, June 29th, the policy was issued; eight days after ward, July 7th, Skabitski went to the Cook County hospital on account of illness. He was dismissed from the hospital July 22nd and August 13th following he again went to the County hospital where he remained until October 1, 1931, when he died. In his written application of June 25, 1931, Skabitski stated in reply to questions that he had not been sick or ill; that he did not have heart disease and that he had never received any treatment in a hospital or institution, and that he was in sound health. He declared that the answers made by him were true and that he was in sound health.

It appears from the record of the Cook County hospital that Skabitski went to that hospital December 6, 1929, where his ailment was diagnosed as chronic myocarditis and pediculosis; that he was discharged from that institution January 8, 1930, but the record

RECEIVED
JULY 10 1914
U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON

U.S. DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

THE SECRETARY HAS RECEIVED FROM
THE DIRECTOR OF THE BUREAU OF PLANT
INDUSTRY, A REPORT...

22914-025

REPORT OF THE DIRECTOR OF THE BUREAU OF PLANT INDUSTRY
ON THE...

The Director of the Bureau of Plant Industry has the honor to acknowledge the receipt of a letter from the Secretary of the Department of Agriculture, dated July 10, 1914, in which the Secretary has requested the Director to report on the progress of the work of the Bureau of Plant Industry during the year 1913.

The work of the Bureau of Plant Industry during the year 1913 has been characterized by a marked increase in the number of applications for the introduction of new plants and plant products into the United States. This increase has been due to a number of factors, including the growing interest in the production of new and improved varieties of crops, and the increasing demand for new and improved methods of plant propagation and control.

It is a pleasure to report that the work of the Bureau of Plant Industry during the year 1913 has been successful in meeting the needs of the Department of Agriculture and the people of the United States. The Bureau has been able to introduce a number of new and improved varieties of crops, and to develop new and improved methods of plant propagation and control.

discloses that his condition was "improved." It further appears from the Cook County hospital records that Skabitski was again admitted to the hospital July 7, 1931, and his condition was diagnosed as cardiac decompensation with arteriosclerosis; that there was "shortness of breath, swelling of legs, nausea and occasional vomiting. *** For the past 2 or 3 years pt. has become short of breath upon the slightest exertion;" that he was discharged July 22, 1931, "improved;" that August 17th he was again at Cook County hospital and remained there until his death October 1, 1931. The certificate of the attending physician states that the immediate cause of the insured's death was "organic heart disease."

Dr. Wolff, who had been connected with Cook County hospital, testified about certain records concerning the insured made by him while connected with that hospital. It appears that Dr. Wolff examined the insured and his diagnosis was that the patient had arteriosclerosis, cardiac decompensation, auricular fibrillation and had been afflicted with arteriosclerosis for about five years. This examination was made July 7, 1931.

There is other evidence in the record from the doctors who treated the patient, all tending to show that the insured was suffering from some impairment of the heart for a considerable time before the policy was issued.

Plaintiff testified that she was a sister of deceased; that deceased in his lifetime was a butcher working in a meat market every day, and appeared to be in good health; she had never known him to be otherwise.

John Gasinski, called by plaintiff, testified that he had received the application from Skabitski; at that time insured answered that he was in good health and that he appeared to be healthy; that the witness had seen Skabitski working in the butcher shop and he appeared to be in good health. This is substantially

diagnosis that the condition was "hypertension," it further appears from the above family medical records that "hypertension" was again ascribed to the deceased July 7, 1931, and his condition was diagnosed as cerebral degeneration with arteriosclerosis; that there was "enlargement of heart, swelling of legs, ankles and occasional vertigo." On the last day of 1931, his condition was "hypertension," and the following observation: "That patient died as a result of cerebral degeneration." That patient died as a result of cerebral degeneration and cerebral degeneration was the cause of the preceding physical states and the immediate cause of the patient's death was "hypertension and cerebral degeneration."

Dr. Kelly, who had been connected with Cook County Hospital, testified about certain records connecting the deceased with him while connected with that hospital. It appears that Dr. Kelly examined the patient and his diagnosis was that the patient had arteriosclerosis, cerebral degeneration, and cerebral degeneration and that he was afflicted with arteriosclerosis for about four years. This examination was made July 7, 1931.

There is other evidence in the record from the autopsy which tended to show that the deceased was afflicted with some enlargement of the heart for a considerable time before the attack was fatal.

Witnesses testified that the man a sister of deceased; that deceased in his lifetime was a patient working in a meat market; that he was in good health; and that they knew him to be a patient.

John Deane, called by witness, testified that he was present the afternoon from Chicago; at that time deceased was in good health and that he was connected to be healthy; that the witness and some Chicagoans residing in the hospital were present as he in good health. He is substantially

all the material evidence in the case.

The policy in question provided that "No obligation is assumed by the Company unless on the date and delivery hereof the insured is alive and in sound health;" and defendant contends that the burden was on plaintiff to prove that at the time of the delivery of the policy the insured was in good health before recovery can be had; that such proof is a condition precedent which must be met by the plaintiff. There are some cases that announce the law in accordance with defendant's contention, but we have recently carefully considered this question and reached the conclusion that where there is such provision in the policy the burden of proving that the insured was not in good health at the date of the issuance of the policy was a matter of defense. Wagoner v. Fraternal Ins. Co., 271 Ill. App. 509.

The defendant further contends that the undisputed evidence shows that the insured, in his application, made false and fraudulent answers to questions put to him; that these answers were material to the risk and therefore the court should have directed a verdict in defendant's favor at the close of the evidence, as requested. We think this contention must be sustained. The undisputed evidence shows that the insured had been a patient at Cook County Hospital from December 6, 1929, to January 3, 1930, at which time his ailment was diagnosed as chronic myocarditis and pediculosis. And in his application of June 25, 1931, he stated in answer to questions that he had never been ill, had not been confined to a hospital or other institution for medical treatment, and that his health was good. Five days after this application the policy was issued, and eight days thereafter, July 7th, he was again confined to the County hospital where his trouble was diagnosed as cardiac decompensation.

From the foregoing it is obvious that the answers were false, and that they were material. These facts were not contradicted ex-

all the material evidence in the case.

The policy is provision provided that the obligation is

assumed by the company subject to the fact and delivery of the

insurance is active and its receipt receipt; and the company

the policy was on condition to provide that at the time of the delivery

of the policy the insured was in good health and was not

and is not; that the policy is a condition precedent to the

and is not receipt; that the policy is a condition precedent to the

in accordance with the company's regulations, and no policy

policy is provided that the policy is a condition precedent to the

where there is such provision in the policy the burden of proving

that the insured was not in good health at the time of the delivery

of the policy was a matter of defense. Insurance at Birmingham, Ala.

1917, 211 Ill. 2d, 211.

The defendant's policy provided that the insured was to

agree that the insured, in his application, was in good health

and was not receipt; that the policy is a condition precedent to the

to the time and receipt the company should have received a receipt

in defendant's favor of the value of the policy, as provided. The

which the defendant was to maintain. The defendant's

where the insured was not a person as such receipt receipt

from defendant's policy, as provided, as when the insured

was assigned an absolute ownership and possession. And in his

application of 1917, 211, the policy is provided in

he had never been ill, and not been confined in a hospital or other

institution for medical treatment, and his health was good.

The date after which application the policy was issued, and after

with defendant, 1917, 211, the policy is provided in the company's

first under his receipt and receipt as receipt receipt.

from the defendant as in receipt from the company with

and that the receipt. These facts were not receipted in

cept by two witnesses who testified that the insured appeared to be in good health and worked at his usual occupation in the butcher shop. This testimony did not contradict the fact that the answers made by the insured were false and material. The court should have directed a verdict at the close of the evidence as requested by defendant.

The judgment of the Municipal court of Chicago is reversed with a finding of fact. Sec. 89 Civil Practice Act.

JUDGMENT REVERSED WITH A FINDING OF FACT.

McSurely and Ketchett, JJ., concur.

except by the witnesses who testified that the insured happened to be in good health and engaged at his usual occupation at the earlier date. This testimony did not contradict the fact that the message sent by the insured was false and untrue, and that the insured had intended a violation of the laws of the United States by

deliberate.

The defendant in the foregoing words of intent is charged with a violation of the laws of the United States by the defendant in the foregoing words of intent. The defendant in the foregoing words of intent is charged with a violation of the laws of the United States by the defendant in the foregoing words of intent.

Respectfully and faithfully,
J. J. J.

37747

AMERICAN AGENCY COMPANY,
a Corporation,
(Plaintiff) Appellant,

vs.

HENRY L. LEMONS, Inc., a Corporation,
(Defendant) Appellee.

CONTINENTAL CONSTRUCTION CORPORATION,
a Corporation,

Garnishee,

THE FIRST NATIONAL BANK AND TRUST
COMPANY, a Corporation,
(Intervenor) Appellee.

H 50
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

279 I.A. 6254

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of attachment against Henry L. Lemons, Inc., a corporation, to recover \$19,739.41 with interest thereon. Defendant was a non-resident. The Continental Construction Corporation, a corporation, was served as garnishee. It answered that it had in its possession a sum of money, due under a contract which it had theretofore entered into with defendant, in excess of the amount claimed by plaintiff, but that prior to the service of the garnishee summons on it, the First National Bank and Trust Company of Tulsa, Oklahoma, claimed to be entitled to the money under an assignment from defendant, Lemons, Inc. The bank and another corporation, which it is not necessary to notice here, intervened. The case was tried before the court without a jury, the facts were stipulated, judgment was entered in plaintiff's favor and against the defendant, Lemons, Inc., for \$22,505.66, but the funds in the hands of the garnishee, \$23,336.60, were awarded to the intervening bank of Tulsa. The defendant appeals from the judgment awarding the money, in the hands of the garnishee, to the intervening bank.

The record discloses that defendant, Lemons, Inc., entered into two contracts with the Continental Construction Corporation, the

LEWIS & CLARK
a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

LEWIS & CLARK, Inc., a Corporation,
(Incorporated in Oklahoma)

Plaintiff brings an action of assumpsit against Henry L. Lewis, Inc., a corporation, to recover \$19,730.41 with interest thereon. Defendant was a non-resident. The Continental Construction Corporation, a corporation, was served as garnishee. It answered that it had in its possession a sum of money, the nature and amount of which it had theretofore advised into this statement, in answer to the demand filed by plaintiff, but that prior to the service of the garnished summons on it, the First National Bank and Trust Company of Tulsa, Oklahoma, claimed to be entitled to the money under an assignment from defendant, Lewis, Inc. The bank and another corporation, which it is not necessary to name here, intervened. The case was tried before the court without a jury, the facts were stipulated, judgment was entered in plaintiff's favor and against the defendant, Lewis, Inc., for \$22,805.66, but the funds in the hands of the garnishee, \$21,412.50, were awarded to the intervening bank of Tulsa. The defendant appeals from the judgment awarding the money, in the hands of the garnishee, to the intervening bank. The record discloses that defendant, Lewis, Inc., entered into two contracts with the Intervenor Construction Corporation, the

garnishee, one dated September 9, 1930, for the construction of about 113 miles of gas pipe lines, etc., in Mills and Warren Counties, Iowa, and the other contract dated December 3, 1930, for the construction of 30 additional miles of pipe lines, in Marion county, Iowa. The contract price for the work was \$1,100,000. October 27, 1930, and again on January 3, 1931, defendant, Lemons, Inc., entered into two assignments in writing with the First National Bank and Trust Company, of Tulsa, Oklahoma, the intervenor. Each of these assignments recited that Lemons, Inc., was desirous of borrowing money from the bank and to secure the payment of the indebtedness it assigned the moneys due and to become due it under its construction contracts with the Continental Construction Corporation, to the Tulsa bank. The assignments contained the following: "Henry L. Lemons, Inc., has this day and does by these presents, sell, assign, transfer, set over and convey unto The First National Bank and Trust Company of Tulsa all its right, title and interest in and to all sums of money due or to become due under said contract."

Lemons, Inc., began the construction work under the contracts, in Iowa; the garnishee, the Construction company, was notified of the two assignments and thereafter paid the monies coming due, to Lemons, Inc., for its construction work, to the bank; \$127,124.98 was thus paid to the bank before the service of the garnishee summons, and after service of the summons, \$31,361.15, leaving a balance due in the hands of the Construction company in excess of the amount of plaintiff's claim.

The facts further show that upon the faith of the two assignments, and to assist the defendant, Lemons, Inc., in performing its work, the Tulsa bank made loans to it aggregating \$381,000. The money so advanced was used by Lemons, Inc., to defray the cost of the work required of it under the two contracts.

[illegible]

From the stipulated facts it further appears that plaintiff is an insurance agency and had furnished to the contractor, Lemons, Inc., Workmen's Compensation and Public Liability Insurance. The two construction contracts specifically provided that the contractor should furnish insurance, and plaintiff issued the policies which were accepted. It is agreed that there is due to plaintiff from the defendant, Lemons, Inc., for insurance premiums on the policies, a balance of \$19,739.41 and interest, being the amount sued for.

Plaintiff's position is that it is entitled to be paid the amount of its judgment out of the moneys remaining in the hands of the Construction company on two theories: (1) That by a proper construction of the two assignments the bank acquired no interest in the moneys held by the garnishee Construction company after the assignments were executed; and (2) that wholly apart from such construction, since plaintiff furnished the insurance specified in the two construction contracts as part of the work under these contracts, it "has an equity or equitable lien, in, or upon said fund, prior to that of the intervener bank;" that the assignments were merely equitable assignments.

In support of the first point counsel for plaintiff say, "Properly construed, the assignments in question did not pass nor affect future or contingent earnings;" - that they did not pass nor affect moneys earned by Lemons, Inc., for the work it performed under the two construction contracts after the date of the execution of the two assignments. It is conceded by both parties that the two assignments did not purport to assign the construction contracts, and counsel for plaintiff contend that the assignments did not assign "all money due, or to become due thereunder, and all benefits accrued or to accrue, but merely assign 'the right, title and interest' of the defendant contractor in and to said moneys

Two construction contracts specifically provided that the contractor was to furnish insurance, and plaintiff issued the policies which were accepted. It is agreed that there is no policy in favor of defendant, Lazard, Inc., for insurance premiums on the policies, a balance of \$19,735.41 and interest, being the amount

President's position is that it is entitled to be paid the amount of the judgment out of the money remaining in the hands of the Canadian company on two theories: (1) that by a proper construction of the two assignments the bank acquired an interest in the money held by the Canadian Canadian company after the assignments were made; and (2) that under the law of the situation, where a liability is assigned the assignee acquires the right to sue on the debt in case of the non-payment of the debt by the assignor.

in support of the first point advanced for plaintiff's use, "typically conducted, the assignment in question did not have any effect on the plaintiff's position." The court said that the assignment in question was not a "true" assignment, but a "sham" assignment, and that the plaintiff was entitled to recover the amount of the debt.

and benefits." We think this contention cannot be sustained. By the express terms of the assignments, Lemons, Inc., sold, assigned, transferred and set over to the bank of Tulsa "all its right, title and interest in and to all sums of money due or to become due under said contract and ⁱⁿ and to all benefits accrued or to accrue thereunder." We think this language is plain and unambiguous. By it all moneys due or to become due to Lemons, Inc., under the contract were assigned by it to the Tulsa bank from whom Lemons, Inc., was borrowing money with which to perform the work.

The contention of plaintiff, as we understand it, viz., that the money which would become due under the contracts subsequent to the assignments was not assigned, but that only the "right, title and interest in and to" all such moneys, is hypercritical and wholly untenable. Under the two assignments and the undisputed evidence, the Tulsa bank was entitled to the moneys as against plaintiff, who was but a general creditor of Lemons, Inc.,

Hawley v. Bristol, 39 Conn. 26; Hallin v. Wenham, 289 Ill. 352.

Counsel for plaintiff have cited a number of authorities, some of which hold that after acquired interest in real estate is not conveyed by a quit-claim deed, but clearly they are not applicable to the facts here.

We have examined all the authorities cited by counsel and are clearly of the opinion that none of them sustains plaintiff's contention. We think it clear that it was the intention of Lemons, Inc., when it executed the two assignments, to assign all moneys that were due or that might become due to it under the two construction contracts, to the Tulsa bank, and we know of no rule of law that would prevent such an assignment.

(3) Has plaintiff an equitable lien, superior to the claim of the Tulsa bank, on the money sought to be recovered in this action because it furnished insurance to Lemons, Inc., as required by the

and himself" as being this condition caused by the fact that the money was not being used for the purpose of the work.

[illegible]

...and recovered by a post-office box, but already they are not applied to the same.

It is not possible to say whether the above is a correct or incorrect statement. The statement is a statement of fact, and it is not possible to say whether it is a correct or incorrect statement. The statement is a statement of fact, and it is not possible to say whether it is a correct or incorrect statement.

of the Police, on the money being so received in said action.

two contracts made by Lemons, Inc., with the Construction Company?

Plaintiff's contention is that because it furnished the insurance to Lemons, Inc., the contractor, as provided in the construction contracts entered into between Lemons, Inc., and the Construction Company for the doing of the work in Iowa, it "has an equity in the fund, derived from these contracts, in the hands of the garnishee;" that the two construction contracts required Lemons, Inc., to furnish insurance "as a part of the work" and therefore plaintiff has an equity in the fund; that the Tulsa bank took the two assignments subject to all rights which could be asserted against the assignor. We think this argument is unsound. Undoubtedly the bank took the two assignments subject to all rights which the garnishee might assert against the assignor - Lemons, Inc. But the bank did not take the assignments subject to claims of general creditors against the assignor, arising out of the contract.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

for construction made by the Government, Inc., with the construction company
"The Government" is the name of the company which is the subject of the
contract in the case, Inc., the construction, as provided in the
contracted construction contract entered into between the Government, Inc., and the
Government, Inc., for the design of the work to be done, it then an
equity in the land, entered into these contracts, in the name of
the Government, Inc., the two construction contracts provided
the Government, Inc., as "limited liability" as a part of the work and
the Government, Inc., as an equity in the land; that the Government, Inc.,
that the two construction contracts in all respects which would be re-
sulted against the Government, Inc. that this agreement is unusual.
Unusually one bank took the two construction contracts as all
rights which the Government, Inc., entered against the Government, Inc.,
the Government, Inc., that the bank did not take the construction subject
to state of the Government, Inc., without the Government, Inc.,
at the contract,
the Government, Inc., of the Government, Inc., of the Government, Inc.,
the Government, Inc.,

APPROVED

RECEIVED AND RECORDED, 7/1, 1900.

37778

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error.

vs.

PATRICK MARQUEZ,
Defendant in Error.

BRANCH OF THE MUNICIPAL COURT
OF CHICAGO.

279 I.A. 6261

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this writ of error the People seeks to reverse a judgment of the Municipal court of Chicago, setting aside a judgment entered by that court under Section 39 of the Practice Act, and discharging the defendant.

The record discloses that on the night of September 24, 1933, Patrick Marquez was arrested and on the next day a complaint was filed against him in the Municipal court of Chicago charging that he drove and operated a motor vehicle in the public highway in the city of Chicago while drunk or intoxicated. On the same day there was a hearing before the court without a jury, the defendant was found guilty as charged and sentenced to one year in the House of Correction and a fine of \$100 was imposed. He was delivered into the custody of the keeper of the House of Correction on the same day.

December 16th following, defendant filed a motion under section 39 of the Practice Act and section 21 of the Municipal Court Act, to vacate and set aside the judgment, and in support of this two affidavits were filed. There were no counter affidavits filed by the People and no pleading of any character, so it must be assumed that the People raised the question of the sufficiency of the petition and affidavits as though it had demurred. Defendant was brought from the House of Correction upon order of court, and the matter was finally disposed of on January 17, 1934, when the court sustained the motion, vacated the judgment, then heard the case apparently on its merits, found defendant not guilty and

RECEIVED BY THE CHIEF OF POLICE
JANUARY 17, 1935

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RECEIVED BY THE CHIEF OF POLICE
JANUARY 17, 1935

279 I.A. 628

RECEIVED BY THE CHIEF OF POLICE
JANUARY 17, 1935

This will of course be a very important case to the people of Chicago, and it is hoped that the Chicago Police Department will be able to solve this case as soon as possible. The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible.

The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible. The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible. The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible.

Chicago Police Department, Chicago, Illinois, January 17, 1935. The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible. The Chicago Police Department is a very large and powerful organization, and it is hoped that it will be able to solve this case as soon as possible.

discharged him. No evidence is preserved in the record.

The question then is: Are there sufficient facts shown by the verified written motion filed under section 69, and the affidavits in support thereof, to warrant the court in granting the motion? The motion was verified by defendant's mother and afterward defendant filed an affidavit, or supplemental petition as it is designated, in which he swears that he was arrested about eleven o'clock p. m. of September 24, 1933, and shortly thereafter consulted an attorney who had been retained by defendant's mother. The case was set for the following morning in the Municipal court of South Chicago. On the morning of September 25th, about 8:45 o'clock, shortly before the coming of the cause, defendant's counsel advised him that he would not be able to try the case on that day because he was engaged in the trial of a case in the Circuit court before Judge LeBay, in the county building, and advised defendant to apprise the court of this fact and to ask the court for a continuance until the following morning; that at that time defendant's counsel spoke to one of the clerks of the court and advised him of the fact that counsel could not appear at the hearing because of his engagement in the Circuit court in a case then on hearing, and that he would like to have the case go over until the next morning; that the clerk thereupon promised the attorney the case would be continued, or he would inform the court of counsel's request.

The affidavit of defendant further sets up that when the case was called for trial he spoke to the police officer (about ten feet from the Judge's bench) who had made the arrest, and told the officer that he wanted a continuance; that the police officer told him to keep still, he was going in trial and was "going to get sent to jail for life;" that the case would have to come to trial; defendant replied that he wanted a continuance but was commanded by the officer to keep quiet; that the officer spoke in an undertone so

identified him. An address is given in the record.

The question then is: Are these statements taken down by

the witness without any other cross-examination, and the other

facts in support thereof, in support of the facts in question, the

witness. The witness was verified by defendant's mother and attorney

defendant filed an affidavit, or supplemental affidavit as it is

indicated. In which he swore that he was arrested about eleven

months ago, at New York City, New York, and that he was

arrested on a charge that he had been retained by defendant's mother.

The case was set for the following morning in the criminal court

at New York City. On the morning of September 10th, about 9:15

o'clock, shortly before the opening of the court, defendant's counsel

advised him that he would not be able to try the case on that day

because he was engaged in the trial of a case in the Circuit Court

before Judge Brady, in the county building, and advised defendant to

appear the court at this time and to see the court in a continuance

until the following morning; that at that time defendant's counsel

went to one of the officers of the court and advised him of the fact

that counsel would not appear at the hearing because of his engagement

went in the Circuit Court in a case then on hearing, and that he

would like to have the case set over until the next morning; that the

court thereupon granted the attorney two more weeks to continue, or

he would inform the court of counsel's intention.

The affidavit of defendant's mother was by her own admission

was called for trial to appear to the police station (about ten days

from the judge's bench) and had made the arrest, and told the

officer that he wanted a continuance; that the police officer

told him to stay still, he was going to trial and was "going to get

sent to jail for life"; that the case would have to come to trial;

defendant replied that he wanted a continuance and was accompanied by

the officer to keep quiet; that the officer spoke in an undertone to

the Court could not hear what was said; that defendant was in great fear because of what the officer had said, and when the case was called he was afraid to say anything to the Court; that the police officer said to the Court that defendant was intoxicated the night before when he was arrested; that defendant, on account of his fear, did not say anything to the Court; that there was an interpreter in court who translated the Mexican language into English; that the interpreter did not like defendant; that when the Court asked the interpreter who defendant was the interpreter replied with some disparaging remarks that the witness did not clearly hear or understand; that although defendant had been drinking some the night before, he was not intoxicated; that the accident resulted from driving his automobile into a gasoline station to get gasoline, when he struck a stone or rock which caused the automobile to swerve, striking the gasoline pump and doing some damage; that it cost about \$16 to repair the damages, of which defendant's mother had paid about one-half.

Defendant's attorney filed an affidavit, saying that he had been retained to represent defendant about eleven o'clock on the night of September 24th, and that he saw defendant and learned that the case was coming up the following morning, and advised defendant that he could not be present at the hearing at that time because he was trying a case in the county building in the Circuit court; that on the morning of the trial, about 8:45 o'clock, he spoke to the clerk of the court and apprised him of the facts and wanted the case continued until the next day; that he understood the case was to be continued, the clerk stating he would speak to the Court and apprise the Court of the facts.

Where a motion is filed under section 40 of the old Practice Act, "The sufficiency of the motion, which is regarded as a declaration in a writ of error coram vobis, or a motion under the statute,

the Court would not hear what was said; that defendant was in great
fear because of what the officer had said, and when the case was
called he was afraid to say anything to the Court; that the police
officer said to the Court that defendant was intoxicated the night
before when he was arrested; that defendant, on account of his fear,
did not say anything to the Court; that there was no conversation in
court was conducted the whole time into English; that the
information his wife defendant's wife was the same night the
information was defendant was the information provided with some
information because that the witness did not clearly know or
understand; that although defendant had been drinking since the night
before, he was not intoxicated; that the police provided him
driving his automobile into a hospital station to get examined, when
he asked a nurse or some other person who was available to answer,
telling the examining group not to let him go; that at that time
he was to report the charges, of which defendant's mother had told him
the night.

Defendant's attorney filed an affidavit, saying that he had
been retained to represent defendant about eleven o'clock on the
night of December 21st, and that he saw defendant and learned that
the case was coming up the following morning, and advised defendant
that he could not be present at the hearing at that time because he
was trying a case in the early morning in the District Court; that
on the morning of the trial, about nine o'clock, he spoke to the
clerk of the Court and advised him of the facts and asked the
case continued until the next day; that he understood the case was
to be continued, the clerk asking he would speak to the Court and
advise the Court of the facts.

There is a motion in filed under section 30 of the old Practice
Act, and defendant of the motion, which is regarded as a defense.
There is a bill of costs costs costs, as a matter under the statute.

must be raised by demurrer, plea of nulla est actio, by motion to dismiss, by pleading special matter in confession and avoidance, or by making an issue of fact by traversing the declaration. *** In this State the issue of fact may be made, and is generally made, by affidavits in support of the motion and by counter-affidavits denying the facts set up in the motion and affidavits in support thereof, in which case the burden of proof is upon the party making the motion to prove his facts alleged by a preponderance of the evidence." People v. Crooks, 326 Ill. 266-280, 281.

Defendant contends that he was not represented by counsel on the trial of the case September 25, 1935, to which contention the People reply that the record, which imports verity, recites as follows: "Now comes the people by the State's attorney and the defendant as well in his own proper person as by counsel also comes," and that this recitation cannot be contradicted, citing Maine v. Gosner, 67 Ill. 536. In People v. Green, 388 Ill. 468, the court, in discussing the motion under section 89 of the Practice act, said (p.473): "The order made on such motion is a final order and directly reviewable as a final judgment. *** It is generally recognized that the proceedings under a motion or petition in the nature of a writ of error coram nobis are civil in their nature. *** The burden is on the one seeking to set aside the judgment, to prove by a preponderance of the evidence the facts alleged in his petition or motion. Errors of fact which may be availed of under section 89 of the Practice act, or section 21 of the Municipal Court act, include duress, fraud and excusable mistake.

"A writ of error coram nobis, or a motion under the statute, is an appropriate remedy in criminal cases as well as civil and lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, or without negligence on his part, he has been deprived of a defense which he

[illegible]

could have used at his trial, and which, if known by the court, would have prevented conviction."

And in People v. Fargo, 338 Ill. 418, which was a proceeding under section 89 of the Practice act, it is said (p. 450):

"Counsel for plaintiff in error have characterized their petition as one in the nature of a writ of error coram nobis. It is argued that while the record shows that plaintiff in error appeared by counsel, he, in fact, had no counsel. *** Reference to the petition discloses only the statement that while the record showed plaintiff in error was represented by counsel such fact was untrue." The court then discusses further evidence and apparently considers the question as to whether defendant was in fact represented by counsel; and in holding the petition insufficient the court said (p.451):

"This petition does not come within the rule governing petitions in the nature of writs of error coram nobis. There is no evidence that plaintiff in error was convicted by duress, fraud, or by mistake or ignorance on his part. ***"

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance."

In that case it was further held that a motion under section 89 of the Practice act was designed to correct errors of fact happening at the trial which the court would not have committed if it had been in possession of certain facts unknown to it, and it was said, "It can scarcely be said that the court did not know that plaintiff in error was not represented by counsel." So, in the instant case, it is not possible that the trial judge did not know whether the defendant was represented by counsel because if he were so represented he would be in the ocular presence of the court.

In the instant case, can it be said that defendant was

could have been at his trial, and would, if known by the jury,

would have been admitted as evidence.

and in People v. Brown, 304 N.Y. 400, which was a previous

and under section 36 of the Evidence Act, it is held (p. 400):

"Section 36 of the Evidence Act is not a mandatory rule requiring

as one in the nature of a rule of exclusion. It is intended

that while the jury is permitted to consider evidence suggested by

the court, it is not to be considered as evidence. The reference to the provision

disclosed only the statement that while the jury is permitted to consider evidence

in error was recommended by counsel, it is not evidence." The

court then discusses further evidence and apparently considers the

question as to whether evidence was in fact recommended by counsel;

and in holding the petition invalid the court said (p. 401):

"This petition does not state with any certainty that the

the nature of the trial of People v. Brown. There is no evidence that

evidence is that the evidence by counsel, trial, or by mistake or

ignorance on his part."

"The court in the trial of criminal cases is bound to see

that counsel is qualified, when recommended, the defendant's rights are

protected and maintained."

In that case it was further held that a motion under section

36 of the Evidence Act was held to be correct where it was held

that at the trial when the court would not have considered it if

the fact is possession of certain facts known to it, and it was

said, "It was necessary to say that the court did not know that

petition in error was not recommended by counsel." So, in the People

present case, it is not possible that the trial judge did not know

whether the defendant was represented by counsel because it is well

known that he would be in the court presence of the court,

in the instant case, and it is well known that defendant was

convicted by "duress, fraud, or by mistake or ignorance on his part." We think this was a question of fact for the court. The affidavits in support of the motion disclose facts which indicate that defendant, through fear of the police officer, was not permitted to state his side of the case to the court. These averments in the affidavits were not controverted and the court might well have concluded that such facts were shown by a preponderance of the evidence, as the rules require.

Upon a careful consideration of the entire record we are unable to say that the finding of the court in this respect is against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Hatchett, JJ., concur.

questioned by the jury, that, on the witness is ignorant as to the party
to which this was a question of fact for the jury. The witness
in support of the motion witness found which indicated that before
and, between them of the witness, was not admitted to state
his side of the case to the jury. These statements in the witness
the jury was not authorized and the jury might have concluded
that such facts were shown by a preponderance of the evidence, as
the jury thought.

When a certain conclusion of the jury would be
made to say that the finding of the jury in this respect is
against the weight of the evidence.
The finding of the majority of the jury is affirmed.
The jury is affirmed.

Respectfully and Obediently, J. J. Jones,

37839

PEOPLE OF THE STATE OF ILLINOIS
ex rel. MEYER GREENBERG,
Defendant in Error.

vs.

H. S. GRATCH,
Plaintiff in Error.

537
BRANCH TO MUNICIPAL COURT
OF CHICAGO.

279 I.A. 626²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Meyer Greenberg, who was a defendant in an action brought in the Municipal court of Chicago, filed his petition against the defendant, H. S. Gratch, who was the attorney for plaintiff in the Municipal court action, praying that a rule be entered against Gratch to show cause why he should not be adjudged in contempt of court. Defendant, Gratch, answered the petition denying that he had been guilty of such contempt. The matter was heard by the court, and an order entered finding Gratch guilty of contempt of court, and a fine of \$100 or thirty days in the county jail was imposed. Gratch prosecutes this writ of error.

The record discloses that April 19, 1932, Jacob Altman caused judgment by confession to be entered against Meyer Greenberg and Jeannette Greenberg, his wife, in the Municipal court of Chicago, on two junior mortgage notes signed by the Greenbergs and owned by Altman. On the same day Gratch, as attorney for Altman, caused an execution to be issued and on his written order the execution was returned nulla bona by the bailiff the same day. Thereupon Gratch filed an affidavit for garnishee summons in the case and it was afterward served on the garnishee, the Hyde Park Kenwood National Bank of Chicago. The matter was continued from time to time, and in the meantime the Hyde Park Kenwood National Bank failed and was taken over by the Auditor of Public Accounts. Afterward, January 13, 1933, by agreement of Gratch, representing Altman, and Lionel A. Sherwin, attorney for the Greenbergs, the garnishee pro-

ceeding was dismissed for want of prosecution. July 27, 1934, more ^{than} ~~one~~ year and a half after the dismissal of the garnishment proceedings against the Hyde Park Kenwood National Bank, Gratch filed another affidavit for garnishee summons in which the New York Life Insurance Company, the Metropolitan Life Insurance Company, and the Equitable Life Assurance Society of the United States were named as garnishees. They were served. The petition for a rule to show cause which was filed by Meyer Greenberg (one of the defendants in the Municipal court, by his attorney, Lionel A. Sherwin) states that the three insurance companies were thereby prevented from paying over money they held, being the property of the defendant, Jeannette Greenberg. After the garnishment proceedings were brought against the three insurance companies, the petition for rule to show cause was filed by Greenberg through his counsel, as above stated. The substance of the allegations of the petition so far as it is necessary to state them here, is that the two junior mortgage notes, upon which judgment was confessed, were secured by a junior mortgage on real estate owned by the Greenbergs; that the Greenbergs at the time the judgment was confessed and the execution returned nulla bona, "were operating a large grocery and delicatessen store at 55th Street in which they were interested." The charge in the petition seems to be that because the Greenbergs owned the real estate, on which there were two mortgages, and were interested in the grocery store, the affidavit for garnishee summons filed by Gratch, in which it was stated that the Greenbergs had no property within the knowledge of Gratch liable to execution, was false; that Gratch knew all the facts and that he fraudulently induced the bailiff of the Municipal court to return the execution nulla bona, and fraudulently induced the clerk of the Municipal court to issue the garnishee summons.

The record further discloses that the judgment by confession

meeting was adjourned for next of consideration. July 27, 1934, more
past and a half after the adjournment of the Government proceedings
against the Right Honourable National Board, United States
attorney for the District of Columbia, in which the
name George, the defendant's wife (Lillian George), and the
petitioner's name (Lillian George) at the United States court
as defendant. They were served. The petition for a writ of habeas
corpus was filed by Edgar G. Gurnea (one of the defendants in
the United States court, by his attorney, Alfred A. Gurnea) stating that
the United States court was in error in its decision. The
over money they had, being the property of the defendant, Lillian
George. After the defendant's name was brought against
the three defendants mentioned, the petition for a writ of habeas
corpus was filed by Gurnea through his attorney, as above stated. The
substance of the allegations of the petition as far as it is concerned
only to state that here, in that the two ladies mentioned, even
which judgment was confirmed, were accused by a Jewish merchant as
real estate owned by the defendant; that the Gurnea at the time
the judgment was confirmed and the execution returned with bond.
There appearing a large group of defendants at the
district in which they were interested. The change in the petition
seems to be that because the Gurnea were not real estate, as
before there were two mortgages, and were interested in the property
before, the attorney for Gurnea named filed by Gurnea, in
which it was stated that the Gurnea had no property within the
jurisdiction of the district as mentioned, was served; that Gurnea
know all the facts and that he fraudulently induced the belief of
the United States court in taking the execution with bond, and Lillian
George, Lillian George and Alfred A. Gurnea, were the
The record further discloses that the judgment by confirmation

was for \$285.32, together with \$7 court costs, and that the real estate on which the Greenbergs had executed the junior mortgage securing the two notes upon which judgment was confessed, as above stated, was subject to a first mortgage of \$20,000; that April 7, 1932, twelve days before the judgment was confessed in the Municipal court, a bill to foreclose the first mortgage was filed in the Circuit court of Cook county in which it was alleged that there was \$20,942.96 due under the first mortgage, and that the property was not worth to exceed \$25,000. April 19, 1932, (the same day the judgment by confession was entered by the Municipal court) the Circuit court of Cook county appointed a receiver for the premises conveyed by the two trust deeds and the order appointing the receiver found that the premises at that time were worth less than \$25,000, and were scant and insufficient security for the indebtedness secured by the first mortgage.

The procedure followed by Gratch in causing the judgment to be entered by confession in the Municipal court and the bailiff to return the execution on the same date nulla bona, and the filing of the affidavit for garnishee summons, has been the procedure followed for more than thirty years in Cook county. As far as we are advised, we have never heard that this procedure was fraudulent until the petition for rule to show cause in this case was filed. The order signed by Gratch authorizing the bailiff of the Municipal court to return the execution immediately nulla bona states, among other things, that if the bailiff believes "that nothing can be realized on said execution, and, in the exercise of your discretion conclude to and do return said execution nulla bona, the plaintiff will waive any damages that may accrue to or be sustained by him by reason thereof, and protect you as if you held the same full 90 days."

We think it obvious that it is grotesque to contend that plaintiff, in the confession of judgment case, could have had the

judgment satisfied by levying on the real estate owned by the Greenbergs when the property was subject to two mortgages, the first mortgage being in foreclosure and the property in possession of a receiver. It is equally grotesque to say that plaintiff might satisfy his judgment by levying on the interest of the Greenbergs in the grocery store. The petition merely alleged that at the time the judgment by confession was entered and the execution returned nulla bona, the Greenbergs "were operating a large grocery and delicatessen store at 55th street in which they were interested." Just what their interest was does not appear; whether the property was encumbered is not disclosed. Moreover, if the Greenbergs had ample property to satisfy the judgment, the proper and single thing for them to do was to pay it. Albeit, the judgment creditor, had waited more than two years before he garnished the three insurance companies and during that time he had received no payment on the judgment. The proceeding is wholly without merit and is an attempt to prostitute the process of the court.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely and Hatchett, JJ., concur.

37848

EMILY MARCHETTA and RICHARD MARCHETTA,
Appellants,

vs.

MARIA BARDILLA,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 626³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

February 19, 1934, plaintiffs caused judgment for \$741.07 to be entered by confession in the municipal court of Chicago against Maria Bardella on a promissory note executed by Maria Bardella and her husband, Joseph Bardella, who had died prior to that time. Afterward Maria Bardella, the defendant, filed her petition praying that the judgment be vacated and set aside. The motion was allowed and thereupon the defendant moved the court to dismiss the suit. The motion was sustained, the suit dismissed, and plaintiffs appeal.

The court apparently held that the power to confess judgment was joint and therefore there was no authority to confess the judgment against one of the makers of the note. The warrant of attorney to confess judgment was in the following language: "and to secure the payment of said amounthereby authorize, irrevocably, any attorney of any Court of Record to appear for..... in such Court, in term time or vacation at any time hereafter, and confess judgment without process, in favor of the holder of this Note, for each amount as may appear to be unpaid thereon, together costs anddollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon said judgment, hereby ratifying and confirming all that.....said attorney may do by virtue hereof.

So.....Do.....

his
Joseph (B) Bardella
mark
Maria Bardella."

RECEIVED CHAIRMAN AND MEMBERS FINE
1964

..modulation by tyrosine

[illegible]

1937

253 .A.I. 675

HOWARD O. WILLIAMS, ATTORNEY AT LAW,
TAKES THE CASE TO COURT FOR THE DEFENSE.

FD-302a (Rev. 10-6-95)

14. On January 14, 1964, the following was the substance of the letterhead memorandum (LHM) from the Director, FBI, to the Attorney General, Department of Justice, regarding the above-captioned matter:

[illegible]

SECRET

We think this warrant of attorney was joint and not several. It did not authorize any attorney to confess judgment against either or both of them, but we think it authorizes a confession of judgment against both. Where a warrant of attorney is joint, a judgment entered against one only of the parties who signed the warrant is void. Garman v. Bailen, 275 Ill. App. 388, and it was not necessary that defendant, in her affidavit of merits, set up a meritorious defense. Garman v. Bailen, 275 Ill. App. 388. We think the court did not err in vacating the judgment because it was a nullity.

The defendant filed her general appearance and under these circumstances the court erred in dismissing the suit. Garman v. Bailen, 275 Ill. App. 388.

The judgment of the Municipal court, insofar as it vacated the judgment entered by confession is affirmed, but the judgment dismissing the suit is reversed and the cause remanded; and leave should be given plaintiff's to file an amended statement of claim if the court is so advised.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CAUSE REMANDED.

McSurely and Hatchett, JJ., concur.

The following is a list of the names of the persons who have been appointed to the various committees of the National Council of the American People, for the year 1911. The names are given in alphabetical order, and the committees to which they are appointed are given in parentheses. The names of the persons who have been appointed to the various committees of the National Council of the American People, for the year 1911, are given in alphabetical order, and the committees to which they are appointed are given in parentheses.

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37695

LAKE SHORE COUNTRY CLUB,
Appellee.

vs.

MORACE L. BRAND, ARMIN W. BRAND,
ERNA BRAND ZEDDINS, FRIEDA G.
BRAND, ROBERT F. ZEDDINS and
ERNA M. BRAND,

Appellants.

55
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

279 I.A. 626⁴

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

Complainant filed its bill to enjoin or relieve from a threatened forfeiture of a lease; the chancellor, after hearing, ordered the bill dismissed; complainant appealed to this court, which reversed the order of dismissal and remanded the cause for further proceedings in accordance with the views stated in the opinion which was filed December 29, 1932, Case No. 36091, noted, but not published in full, in 268 Ill. App. 631.

Upon the retrial it was stipulated that the cause would be heard on the same pleadings and evidence contained in the certificate of evidence of the first trial, the transcript of the order of reversal and remandment, and the opinion of this court on the first appeal; it was also stipulated that all the evidence appearing in the certificate of evidence offered by either party should be considered as received in evidence on the trial, irrespective of any ruling of the chancellor on the former trial excluding or limiting the legal effect of such evidence.

Upon this second trial no evidence other than that contained in the certificate of evidence of the former trial was offered. At the conclusion of the second trial the chancellor entered a final decree in favor of the complainant, granting it the relief prayed for in the bill. Defendants now present their appeal from that decree.

Although defendants argue to the contrary, it is well established that questions which have been decided by this court on a

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

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WILLIAM J. WILSON, CHAIRMAN
JAMES H. WILSON, VICE-CHAIRMAN
JOHN A. WILSON, SECRETARY

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THESE ARE THE RESULTS OF THE RESEARCH CONDUCTED BY THE RESEARCHER.

Commissioner of the General Land Office, Washington, D. C., is requested to advise the Bureau of the results of his review of the bill.

When the material is not stipulated, the court would be left to its own devices and evidence contained in the exhibits of the parties, and the opinion in this case on the facts presented, it was also stipulated that all the evidence appearing in the exhibits of evidence offered by either party should be received as relevant to evidence on the trial, irrespective of any ruling of the exclusion in the former trial excluding or limiting the issue of each evidence.

Although defendant claims to the contrary, it is well established that questions which have been decided by this court on a

former appeal will not again be considered upon a second appeal. Such decision is binding not only on the trial court, if the case is remanded, but also on the Appellate court in any subsequent appeal. Union Nat. Bank v. Hines, 187 Ill. 109; Paule v. Hiltner, 361 Ill. 284; Morganroth v. Pink, 227 Ill. App. 244.

We made certain findings in our former opinion and reversed the cause "for further proceedings in accordance with the views stated in this opinion." This was a final adjudication of the questions therein decided, and the trial court, following our directions, which it was obliged to do, entered the order dismissing of the case. In Paule v. DeYoung, 296 Ill. 300, it was held that where the opinion of the Appellate court stated and determined the issues under the law and facts involved in the case, the remanding directions to proceed in accordance with such views amounted to a direction to enter a decree as prayed for in the bill. See also Tribune Co. v. Emery Motor Livery Co., 336 Ill. 537; Wannam v. International Packing Co., 213 Ill. 397; Humphreys v. Sayer, 242 Ill. 50; Sanders v. Peck, 181 Ill. 407; Raemmerer v. Raemmerer, 431 Ill. 184; Boggenbuck v. Brouhaus, 330 Ill. 294.

The question then presented is, What was decided by our former opinion? It should be recalled that in 1909 Virgil W. Brand, Horace L. Brand and Armin W. Brand leased to complainant approximately 76 acres of land in Cook county, which, with certain other acres were to be used by complainant as a golf course; this written lease ran to March 31, 1939; at the same time the lease was made the parties executed an option contract whereby the complainant was given the right to purchase the 76 acres for a named price; in September, 1926, complainant served notice on defendants that it would exercise its option to buy the 76 acres; defendants replied that complainant was in default under the lease and could not exercise this option.

The complainant filed its bill in the Superior court of Cook county seeking performance of the option contract and after hearing

...will not be considered upon a second appeal.
...is limited to finding out only on the trial court, if the case
is remanded, but also on the appellate court in any subsequent
appeal. Union Nat. Bank v. State, 127 Ill. 207; People v. Williams,
421 Ill. 584; People v. State, 127 Ill. 207, 244.
No such contrary findings in our former opinion and reversed
the same "for further proceedings in accordance with the views
expressed in this opinion." This was a final adjudication of the
matter between the parties, and the State cannot, following the
trial, which it was obliged to do, suggest the order is wrong or
the trial is wrong. People v. Williams, 127 Ill. 207. It was said that where
the opinion of the appellate court stated and determined the issues
which the law and facts involved in the case, the remaining dispo-
sition to proceed in accordance with such views amounted to a direct
final order a decree as proper for in the trial. See also People v. Williams,
127 Ill. 207; People v. State, 127 Ill. 207; People v. Williams,
421 Ill. 584; People v. State, 127 Ill. 207, 244.
The question then presented is, when was decided by our
former opinion? It should be recalled that in 1909 (April 1, 1909),
State v. Jones was filed as a complaint against Jones.
It was filed in Cook County, which, with certain other areas were
to be used by complaint as a "bill of indictment." This written Jones was
in March 21, 1909; at the same time the Jones was made the parties
entered an opinion contract whereby the complaint was given the
right to purchase the 75 acres for a named price; in September, 1909,
complaints served notice on defendants that it would proceed the
action to try the 75 acres; defendants replied that complaint was
an attempt under the Jones and would not proceed this action.
The complaint filed the bill in the question court of Cook
County seeking enforcement of the action contract and other things.

obtained a favorable decree; defendants appealed to the supreme court where the decree of the Superior court was reversed and the cause remanded with directions to dismiss the suit. Lake Shore Country Club v. Brand, 339 Ill. 504.

About five months after that suit was dismissed the instant bill was filed to prevent defendants from forfeiting the lease or to relieve from a forfeiture if one had already been declared.

In the Supreme court decision in the option case it was held that the complainant in that case (complainant here) was in default in a number of covenants of the lease, and hence not entitled to enforce its option. Defendants in the present case argue earnestly that the findings of fact and of law contained in the opinion of the Supreme court constitute an estoppel by verdict in this case. Reference to the briefs filed upon the former appeal shows that this same point was presented to us at that time. We there held that the issues in the two cases were different and that no estoppel exists. We quoted from the Supreme court opinion in the ^{option} case, "An option contract does not come within the equitable rule against forfeitures. The question of declaring a forfeiture is not involved"; and we said, "It is clear that there were no equitable considerations nor any question of forfeiture involved in that case. This is clearly stated by the (Supreme) court; but the question involved was one of contract only, while in the instant case equitable considerations are involved because the bill is filed to prevent a forfeiture of the lease *." In that opinion we followed the well settled principle that a court of equity has power either to enjoin a threatened forfeiture or to relieve from a forfeiture if one has already been declared. Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284; Charles Sulvey & Co. v. McKinney, 184 Ill. App. 476. We also held that equity will relieve

obtained a favorable hearing; but when the question of the amount of the award was brought up, the court made the decision of the arbitrator null and void and the award was set aside. See also the case of the

United States v. Smith, 200 U.S. 100.

About five months after that suit was dismissed the plaintiff was filed to prevent defendant from bringing the case on to trial from a settlement it was then already been decided. In the Supreme Court decision in the present case it was held that the complaint in that case (complaint no. 1) was in fact a number of separate cases, and hence not entitled to a separate decision. Defendant in the present case argues strenuously that the complaint is one and is contained in the opinion of the Supreme Court consists of several parts. In this case, defendant is the party who filed the complaint and hence must show that this case is one and is one and the same. He shows that the issues in the two cases were different and that no separate trial was made. He shows that the Supreme Court opinion in the case, "an opinion consisting of one and the same within the meaning of the word 'opinion'." The question of whether a settlement is not involved; and we hold, "it is clear that there were no equitable considerations and any decision of settlement involved in that case. This is clearly stated by the (Supreme) court; and the question involved was one of contract only, while in the present case equitable considerations are involved because the bill is filed to prevent a settlement of the issues." In that opinion we followed the well settled principle that a court of equity has power either to grant a permanent injunction or to refuse to grant an injunction if it can give effect to the decree.

United States v. Smith, 200 U.S. 100; Charles Smith v. Smith, 200 U.S. 100.

McIntyre, 184 U.S. 400. It also holds that equity will refuse

from a forfeiture where the claimed breach has been waived by the landlord with knowledge of the facts, and where the breach is trivial, has not been made in bad faith and can be cured.

The principal alleged default relates to the obligation of complainant to erect a clubhouse upon the leased premises costing not less than \$25,000. The clubhouse contemplated by the lease was not erected upon the leased premises, although a locker and caddy house costing over \$25,000 was constructed upon the leased premises. Complainant's clubhouse, costing over \$100,000, was erected on property adjoining the leased premises, purchased by complainant subsequent to the execution of the lease. There is an abundance of evidence that the complainant, by its legal representative, negotiated with and entered into an agreement with the attorney representing the lessors that the lessors would waive the obligation to erect the clubhouse upon the premises leased by the lease. Counsel representing both parties, respectively, testified, and it is established by this testimony that such an agreement was made and that a writing to this effect was to be drawn and the lessors' execution procured by their attorney, but which was never executed by the lessors because of the unreasonable delay on the part of their attorney, Mr. Rosenthal. It is said that the counsel who represented the defendants in the matter was not authorized to make such an agreement. There are writings from both Horace L. Brand and Virgil H. Brand consenting to such an agreement. Mr. Lessing Rosenthal, who represented the lessors in these negotiations, testified that he had been a practicing attorney in the City of Chicago since 1881; that the father of the defendants was a client of his father, Julius Rosenthal, and that he, Lessing, had represented the defendants as an attorney in times past, his professional relations with them having started even before he was admitted to practice law; that he

From a statement which the signed person has been advised by the
individual with knowledge of the facts, and where the person is
advised, there has been made in fact, and can be made.
The principal alleged details related to the situation of
complaint is that a statement upon the signed person's account
not less than \$15,000. The statement was made by the person who
not entered upon the signed person's, although a father and only
house called every \$15,000 was connected with the signed person.
Complaint's statement, made over \$15,000, was stated on
person's statement the signed person's statement by complaint.
subsequent to the execution of the facts. There is no statement of
evidence that the complaint, by its legal representative, was
related with and entered into an agreement with the signed person
making the person that the person would make the complaint
to enter the statement upon the person's behalf by the person.
General representing both parties, respectively, testified, and it
is established by this testimony that there is no statement was made and
that a witness to this effect was to be made and the person's
evidence entered by this witness, and that the person's statement by
the person's account of the person's belief on the part of their
attorney, St. Petersburg. It is said that the person's statement
the defendant in the matter was not authorized to make such an agree-
ment. There are various other facts stated in the facts and
there is no statement by the person's statement, and the person's
representative the person in their representative, testified that he had
been a practicing attorney in the city of Chicago since 1901; that
the facts of the statement was a witness to this fact, and
testified, and that he, himself, had represented the defendant as
an attorney in some past, his professional relations with the
person's statement were stated as was stated in the facts and

represented Horace L. Brand and also the brothers, Virgil and Armin, in certain matters; that he was their legal adviser and represented them when in 1906 they purchased the land which was subsequently leased to complainant; also, that he represented them professionally in the making of the lease, and that in all of these transactions he was acting as attorney for the three Brand brothers; he confirmed the testimony of Mr. Carl Meyer, the attorney for complainant, with reference to the agreement that the lessors would waive the obligation of the complainant, lessee, to erect its clubhouse upon the devised premises. The evidence establishes the fact that both parties concerned, acting through their respective attorneys, in good faith agreed that the complainant should be relieved of the obligation with reference to the site of the clubhouse.

As we said in our former opinion, no objection or complaint was made that the clubhouse was not built on the devised premises, and defendants received payment of rent in accordance with the terms of the lease for more than seventeen years after they knew that the clubhouse had been built upon the adjoining property. The acceptance of rent with knowledge of a claimed default constitutes a waiver thereof so that no forfeiture may thereafter be asserted on that ground. Fabster v. Nichols, 104 Ill. 160; Vintalero v. Pappas, 310 Ill. 115; Menas v. Loomis, 156 Ill. 392.

Moreover, it has been held that a covenant to erect a building conforming to certain specifications by a certain date is susceptible of only one breach, which is not later than the time stipulated for the performance of the covenant. McGlynn v. Moers, 25 Cal. 334; Jacob v. Down, (1900) 69 L.J. ch. 493 (Eng.); Stanhams v. Junior Army and Navy Stores, Lim., (1915) 84 L. J. ch. 56 (Eng.) The instant lease provided that the clubhouse should be built by April 1, 1912.

Another claimed default is with reference to the taking down

represented before the Court and also the President, Mr. Wilson, and
 again, in certain matters; and he was their legal adviser and rep-
 resented them when in 1916 they purchased the land which was subse-
 quently issued as public land. I am not sure that I am not mis-
 takingly in the matter of the land, and that is all of those
 transactions he was acting as attorney for the United States
 he continued the testimony of Mr. David H. Brown, the attorney for the
 United States, with reference to the agreement that the President would
 waive the obligation of the companies, namely, to erect the
 buildings upon the leased premises. The evidence established the
 fact that the parties concerned, namely, the United States
 Government, in good faith agreed that the companies should be re-
 lieved of the obligation with reference to the site of the buildings.
 As we said in my former opinion, no objection or complaint
 was made that the buildings were not built on the leased premises,
 and the United States Government at that time acquiesced in the fact
 of the lease for more than seventeen years after they knew that the
 buildings had been built upon the subject property. The acquiescence
 at that time constituted a release of the companies from the obligation
 to erect on that site the buildings now mentioned as erected on that
 ground. United States v. Brown, 200 U.S. 101, 102.
 However, it has been held that a covenant to erect a building
 the violation of which constitutes a certain violation of a certain duty is sub-
 ject to an injunction, which is not later than the time
 indicated by the performance of the covenant. United States v. Brown
200 U.S. 101, 102. (1906) 200 U.S. 101, 102. (1906)
200 U.S. 101, 102. (1906) 200 U.S. 101, 102. (1906)
 The United States Government is the plaintiff in the matter.

of a \$25,000 deposit held in trust by the Chicago Title & Trust Company for the benefit of the lessors as security for the erection of the clubhouse according to specifications and within the time limit, and also as security for the performance by complainant of other provisions of the lease. The lease provided that as soon as the complainant, in erecting its clubhouse, should expend a sufficient sum of money so that the \$25,000 in the hands of the trustee would be sufficient to complete the building, this money could be paid out by the trustee for that purpose, and any balance remaining in the fund should be paid to the complainant provided it was not in default in any of the covenants of the lease. The record shows that after negotiations were had between the parties for a substituted performance of the covenant respecting the clubhouse, that the attorneys for the lessors wrote to the trustee informing it that they represented the lessors and authorized and directed it to deliver the \$25,000 deposited to Alfred S. Austrian, one of the attorneys for the complainant, who would call for it the following day. Mr. Lessing Rosenthal testified that shortly before he wrote this letter he had authority from Horace Brand to do so; Mr. Rosenthal testified that at this time Horace Brand "communicated with me and told me, in substance, that I might consent to the withdrawal of the deposit. He was acting for all of them and I was acting for all of them." So testimony was introduced contradicting that of Mr. Rosenthal. It thus appears that complainant was acting in good faith when, with the consent and authority of the attorney for the lessors it withdrew the deposit on August 13, 1909. It should again be noticed that for seventeen years after this deposit was withdrawn the lessors made no complaint and did nothing about it. This pretracted silence tends to establish complainant's claim that the withdrawal of the \$25,000 deposited was expressly consented to by the lessors.

of a \$25,000 deposit held in trust by the Ontario Trust & Loan Company for the benefit of the lessees as security for the execution of the lease. The lease provided that the lessees should be entitled to the use of the money as they saw fit, and that the money should be paid out by the lessees for their business, and any balance remaining in the fund should be paid to the lessor. The lease also provided that the lessees should be entitled to the use of the money as they saw fit, and that the money should be paid out by the lessees for their business, and any balance remaining in the fund should be paid to the lessor. The lease also provided that the lessees should be entitled to the use of the money as they saw fit, and that the money should be paid out by the lessees for their business, and any balance remaining in the fund should be paid to the lessor.

Moreover, the lease provided for the withdrawal of the deposit by the lessee (complainant) if it performed the clubhouse covenant, or, for its withdrawal by the lessors if the lessee did not perform the clubhouse covenant by April 1, 1912; so that in either event the deposit was subject to withdrawal on that date. It was not contemplated that the deposit should remain beyond that date. That the lessors made no request on April 1, 1912, or at any time thereafter for any of the deposit, is conclusive evidence that they knew it had been withdrawn by the complainant pursuant to the agreement made in 1909.

The record amply justified our findings upon the former appeal that the actions of the complainant with reference to the site of the clubhouse and withdrawal of the \$25,000 deposit were in good faith; that the obligations with reference to them were waived and therefore there were no grounds in those respects to justify a forfeiture.

With regard to four private homes which the club permitted to be built upon the demised premises, we hold that this was not sufficient to justify a forfeiture. These, costing \$20,000 each, were built in 1913 and the lessors made no complaint about their presence on the land until the lessee attempted to exercise its option in 1925. It seems to be conceded that these residences may be removed at any time up to the expiration of the lease. Consequently no real injury has been suffered by the lessors as a result of the erection of these residences. Indeed, they might be considered as added security for the payment of the rent and the performance of the other covenants of the lease.

Moreover, the lease expressly permitted the subletting of the leased premises, or any part thereof, to reputable persons, provided that at the time of such subletting the lessee was not in default either in the payment of rent or in the performance of any

However, the issue arising from the withdrawal of the
policy by the Insurer (complaint) it is contained in the
document, or, for the withdrawal of the Insurer if the Insurer
has not given the appropriate payment of what it was in
relation to the Insurer and subject to withdrawal on that basis.
It was not contemplated that the Insurer should remain beyond such
date. That the Insurer made no payment on April 1, 1911, or at
any time thereafter for any of the amounts, in connection with
that they have at that time withdrawn by the Insurer's payment
in the agreement made in 1901.

The record simply justified our findings upon the issue and
that the nature of the complaint with reference to the date
of the withdrawal and withdrawal of the \$25,000 amounts were in
fact that the withdrawal was not made in 1901, but was made
and the Insurer made no payment in those amounts in 1901.

With regard to the private record which the Insurer
in the matter upon the record produced, we said that this was not
sufficient to justify a finding. Indeed, nothing was shown
were held in 1911 and the Insurer made no payment about 1911
payments on the bond which the Insurer attempted to recover in
action in 1901. It seems to be understood that these payments may
be recovered at any time up to the expiration of the bond. Hence
possibly no real liability has been incurred by the Insurer as a result
of the action of these payments. Indeed, they might be con-
sidered as being merely for the payment of the bond and the
payment of the bond amounts to the Insurer.

However, the Insurer's payment of the withdrawal of
the bond produced, or any other matter, no real liability, or
that that at the time of such withdrawal the Insurer was not in the
their claim in the payment of the bond or in the performance of any

other covenant of the lease. As we have said, these residences were built in 1913. The only default that could have been claimed at that time was with reference to the site of the clubhouse and the withdrawal of the \$25,000 deposit; but as we have said the obligations concerning these were waived by the lessors prior to that date, the lessee was not in default when these residences were built and they were therefore permitted under the terms of the lease.

There were claimed defaults in respect to the covenant with reference to taxes and insurance, and it is conceded by counsel ^{for defendants} that such defaults have been cured and are not now in the case.

Counsel for defendants again present the claim that complainant is not in court with clean hands, because of an alleged secret agreement of complainant with the defendant Horace L. Brand, whereby it bought from him five acres adjoining the devised premises as a special and secret consideration to induce him to secure the approval of his two brothers, lessors, to the substituted arrangement with reference to the site of the clubhouse and the withdrawal of the \$25,000 deposit. In our former opinion we held that this transaction was free from any taint and "was in every way honorable."

The bill of complaint alleged that in 1921 Horace L. Brand conveyed his one-third interest in the lease to his daughter, Erna Brand Seddies. Defendants admit this. Complainant contends that since this conveyance Mrs. Seddies and the other lessors are tenants in common and that all tenants in common, alone, have the right to declare a forfeiture, and that as she could not declare a forfeiture for any alleged defaults occurring before 1921, therefore the lessors cannot claim a forfeiture; that all of the alleged breaches occurred prior to 1921 and therefore no forfeiture may be declared. This point was presented and argued on the former appeal and, as shown by our former opinion, was considered and determined. We held that the lease did not vest in the heirs or grantees the landlord's grounds

for forfeiting the lease which existed prior to the time the heirs or the grantees acquired their interest in the property, and we sustained the contention of the complainant in this respect, citing many cases.

We also held that no notice to the complainant of defaults was given as required by the lease as a condition precedent to the rights of the lessors to declare the term ended.

On the trial counsel for defendants offered, if complainant would consent to cancel the lease, to give a new lease to complainant on the same terms and expiring at the same time as the present lease. This would indicate that defendants do not wish to oust complainant from the leased premises but wish to destroy the existing lease for the purpose of preventing the exercise by complainant of its option to purchase. Complainant concededly desires to continue the lease so as to derive whatever advantage may flow from this with respect to the option contract.

After Horace L. Brand conveyed his interest in the premises to his daughter he subsequently became the owner of a one-sixth interest through inheritance from his brother Virgil, who died intestate June 20, 1926.

Counsel for Horace L. Brand has filed a separate brief in which he asserts that complainant's bill should have been filed within sixty days of the service of notice of default, citing Illinois Merchants Trust Co. v. Harvey, 338 Ill. 222, to which complainant replies that this contention is foreclosed by our former decision, as it is a rule that the Appellate court will not review its former decision in respect of matters which were, or might have been, assigned for error upon the first appeal. Tribune Co. v. Emory Motor Livery Co., 338 Ill. 837. On the former appeal we held that no formal notice of default with a view to terminating the lease was ever given to complainant, consequently there is no point

[illegible]

of time from which the sixty day period could be computed.

Neither is there merit in the point that the tender of rent by complainant was ineffective, not having been kept good. Complainant paid all rent under the terms of the lease up to and including September 30, 1936; when complainant at this time served notice on defendants of its intention to exercise its option to purchase the demised premises, defendants began refusing the tenders of rent and have continuously so refused ever since. We stated this fact in our former opinion. Some statement is made in the brief for Horace L. Brand indicating that some of the times the checks tendered for rents were overdrafts. There is no evidence, however, that when the checks for rents were issued and sent to defendants there was not enough in the bank to take care of such checks. It is not material whether, after these checks had been returned and were no longer outstanding, the amount on deposit was sufficient to provide for their payment. Moreover, the record shows that at the conclusion of the trial a certified check for the rent from October 1, 1936, to April 1, 1937, was tendered to the lessors, but refused. We held that the tender was sufficient and has been kept good. However, in view of the repeated refusal of the defendants to accept rental, in equity no technical rules relating to tenders should be applied.

Thompson v. Crains, 294 Ill. 270.

We hold that our former opinion was binding upon the questions presented and decided; that no additional reasons or facts have been presented upon this appeal sufficient to modify or change our former opinion; that a further consideration of all the evidence leads to our conclusion that no sufficient grounds to justify a forfeiture have been made to appear, and that in any event the present defendants, owners of the premises as tenants in common, are precluded from asserting as grounds of forfeiture any alleged defaults occurring prior to April 5, 1941, the date of the conveyance from Horace L.

of that time which the ship was being used for purposes of...
 It is noted in the report that the purpose of this...
 by comparison was ineffective, not having been used...
 and said all went under the name of the house up to and including...
 September 10, 1930; when comparison of this time showed nothing on the...
 landmarks of the situation to establish the nature of work and...
 aimed evidence, statements being taken from the nature of work and...
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 the first a verified amount for the first time October 1, 1930, he...
 April 1, 1930, was referred to the house, but refused. He said...
 that the house was sufficient and had been used. However, in...
 view of the repeated refusal of the evidence to accept rental, in...
 equity no further action should be taken as would be required.

Conclusion. - It is the opinion of the...
 To hold that the house opinion was binding upon the...
 first presented and stated; that the...
 have been presented upon this special sufficient to satisfy it change...
 our former opinion; that a further consideration of all the evidence...
 leads to our conclusion that no sufficient grounds to justify a...
 before have been made to accept, and that in any event the...
 statements, copies of the evidence as furnished in common, are provided...
 from meeting as evidence in evidence and should be taken...
 order to state of fact, the fact as the... (the...)

Brand to his daughter, Mrs Brand Seddies, and no grounds of forfeiture exist for any defaults occurring subsequent to that date.

We have discussed some of the evidence at greater length than we did in the prior opinion, as the chancellor in the first trial limited the admission of evidence. All the evidence is now before us. We are not now reviewing our former conclusions. That opinion is binding, and the conclusions therein reached are fortified by a re-examination of the record.

For the reasons indicated the decree appealed from is affirmed.

AFFIRMED.

O'Connor, F. J., and Matchett, J., concur.

37690

HARRIS TRUST AND SAVINGS BANK, as
Executor of the Estate of Albert
Merrill Coit, Deceased,
Defendant in Error,

vs.

ROBERT H. COIT, CHARLES G. COIT
and ALICE BOVARD,
Defendants.

ALICE BOVARD,
Plaintiff in Error.

56
H
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 6271

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

This case involves the construction of a paragraph of a will. The contested point is whether Alice Bovard, hereafter called defendant, in addition to a \$5000 legacy already paid to her, should also be paid the accrued income on this amount, or should this income go into the residuary estate.

Complainants filed a bill asking for instructions on this point; answers were filed and after hearing the court held that defendant was not entitled to any of the income of the \$5000 legacy, and that such income goes into the residuary estate. Defendant seeks the reversal of the decree.

Clara M. Coit, the widow, resident of Grand Rapids, Michigan, had three sons, Albert Merrill, Robert H., and Charles G. Coit; she died December 30, 1915; by her will she left the residuary estate to her sons, share and share alike; she also undertook to give a legacy to each of the wives of her sons, if and when they married; at the date of the codicil of the will making these provisions her son Albert Merrill was already married to Eleanor Babcock Coit; testatrix bequeathed her \$5000; the provision effecting this will be referred to later; she also undertook to provide legacies for the wives of her other two sons, then unmarried, by a provision as follows:

HARVEY THOMAS AND SARAH ANN, as
Executors of the Estate of ALBERT
HARVEY, deceased,
Petitioners in Equity.

vs.

WILLIAM A. HAYES, Executor of the
Estate of ALICE HAYES,
Respondent.

ALICE HAYES,
Plaintiff in Error.

IN SENATE

AT THE COURT

279 I. A. 627

IN SENATE, JANUARY 18, 1915, THE COURT

This case involves the construction of a bequest of a
will. The contested point is whether Alice Hayes, hereinafter
called defendant, is entitled to a third legacy already paid to
her, should also be paid the second income on this amount, or
should this income go into the residuary estate.

Appellants filed a bill seeking for instructions on this
point; answers were filed and after hearing the court held that
defendant was not entitled to any of the income of the third
legacy, and that such income goes into the residuary estate. The
court seeks the reversal of the decree.

ELMER A. GALT, the widow, executrix of Albert Hayes, Michael-
son, and Isaac sons, Albert Hayes, Robert A., and William A.
Galt; she died December 30, 1913; by her will she left the re-
siduary estate to her sons, Albert and Robert Hayes; she also wished
to give a legacy to each of the wives of her sons, if and
when they married; at the date of the codicil of the will making
these provisions her son Albert Hayes was already married to
Alice Hayes; defendant's husband was dead; her husband
also provided that she will be relieved in Japan; she also provided
to provide insurance for the wives of her sons, and that

executed, by a power of attorney.

"f. I give and bequeath to my Executors and Trustees heretofore named the sum of Ten Thousand Dollars, in Trust, for the following purposes, viz: I sincerely hope my sons Robert and Clarence each will marry, and on the marriage of either I direct my said Trustees to pay to his wife one-half of said Trust Fund and the balance to the wife of the other son when he shall have married. Should either son die without having married, the unexpended share of said fund shall revert to my estate and pass under the residuary clause of my Will."

Clarence G. Coit thereafter legally changed his name to Charles G. Coit; Charles married defendant, Alice Beward, August 30, 1927, and on that date she received from the testatrix's estate the sum of \$5000, being one-half of the \$10,000 mentioned in the paragraph just quoted. Charles G. Coit and Alice Beward were divorced on or about October 23, 1938; Charles G. has not since remarried and Robert Coit has never married.

Albert Merrill Coit died while testatrix's will was being probated and while acting as trustee thereunder, and the complainant here has taken possession of the trust assets of the testatrix, and by stipulation of all the parties was appointed trustee of the trust established by clause "f" above quoted.

The bill of complaint shows that the trustee has in his possession approximately \$10,000, of which amount \$5000 represents principal and the balance accumulations and accretions. Defendant argues that she was entitled, upon her marriage, to all accumulations and accretions of one-half of the so-called "trust fund" from the time of the death of testatrix until the time of defendant's marriage.

It is a cardinal principle that in construing wills courts must ascertain the intent of the person making the will. As has been said, "Adjudicated cases are of little assistance. Each will is a law unto itself." In the Matter of Mayer, 263 N. Y. 919. Guided by this principle we have arrived at the conclusion that the testatrix intended to give each of her future daughters-in-law the specific sum of \$5000, and no more, and that the accumulations and

[illegible]

of that aid he had already received also. I cannot

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On 10/10/57, and on that date she received from the California State Police a letter dated 10/10/57, advising her that the FBI was conducting an investigation of the activities of the "Black Panther Party" and that she was being investigated as a possible member of the same. She stated that she had never been a member of the "Black Panther Party" and that she had never been in contact with any of its members. She stated that she had never been in contact with any of the individuals named in the letter, and that she had never been in contact with any of the individuals named in the letter. She stated that she had never been in contact with any of the individuals named in the letter, and that she had never been in contact with any of the individuals named in the letter.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

and by attention to all the parties was a complete failure of the
and have been responsible of the great success of the Government.
-This system was a failure in every way, and was a complete failure.

The bill of exchange was paid by the bank in full.

You item of the month of January will be the first of the month.
 Item not available at month-end of the year-end "Year 1999" item
 states that not yet verified, when the meeting, in all countries
 organized and the various organizations and individuals, including
 presentation approximately 110,000, of which amount 1000 individuals

2000

It is a condition of the contract that the contractor shall not be permitted to sublet the work or to assign the contract to any other person without the written consent of the Government. The contractor shall be responsible for the performance of the work and for the payment of the contract price. The contractor shall also be responsible for the payment of the contract price to the Government. The contractor shall also be responsible for the payment of the contract price to the Government.

accretions of the trust fund should go into the residuary estate.

Testatrix, a widow, was possessed of considerable real and personal property; she evidently was familiar with business matters, and investments and income; that she knew the difference between principal and income is evidenced by various provisions in her will; by one paragraph she directed \$1800 to be paid to a church and that the income from \$1000 of this legacy was to be used in a certain way; by another paragraph she gave directions with regard to the payment "of the annual net income" from her residuary estate; she also gave directions with reference to the payment of taxes and insurance from the income, and should the income be insufficient the executors or trustees might use so much of the principal sum as necessary. In the provision for the legacy to her daughter-in-law, Eleanor Babcock Coit, she provided that if the legacy should not be paid within a certain time the legatee would be entitled to interest thereon.

The will indicates that the testatrix was a woman of generous disposition, giving numerous bequests to churches, hospitals, charities and relatives. It was natural that she should provide for a gift to the wives of her sons, and she did so directly to her daughter-in-law, Eleanor, by a gift of \$5000, which in the will is characterized "as a token of affection." There is convincing presumption that she intended to give each of her daughters-in-law the same amount, namely, \$5000 to each. Repeatedly the expression occurs in the will - "share and share alike," and in one provision she directs a certain disposition of shares of stock involved in a transaction between herself and Albert Merrill Coit, saying, "In order that no injustice may be done either to my said son or to my other sons." The will abounds in evidence of her intention to treat her sons alike, which is very persuasive evidence of her intention also to treat her daughters-in-law alike.

The provision in the will for Eleanor, wife of Albert Merrill Coit, is as follows:

"e. As a token of affection for my daughter, Eleanor Babcock Coit, I give and bequeath to her the sum of Five Thousand (\$5000) Dollars the same to be due and payable to her one year after my death if it can then be conveniently paid, and if not convenient for my Executors then to pay said sum, she shall be entitled to interest thereon from that date until it is paid, payable semi-annually."

It is a fair presumption that if Robert and Charles had likewise been married at the time this bequest was made that each of their wives would have received \$5000 as did Eleanor Babcock Coit. It is inconceivable to suppose that the testatrix intended that any future wife should receive a larger sum. She would hardly intend that the wife of the son who married last would receive an amount larger than either of the other daughters-in-law had received; it is contrary to the evident intention of the testatrix to treat all her children alike that Albert's wife should receive \$5000, the wife of Charles approximately \$7500, and the wife of Robert, if any, approximately \$10,000 on her wedding day. It is much more reasonable to assume that the testatrix intended to give the same amount to each of her daughters-in-law as a token of her affection.

Defendant's argument rests largely on the use of the term "trust fund" in the paragraph of the will under consideration, and it is said that these words imply not only the \$5000 principal but the accumulated income thereon. By the will the executors and trustees were given "the sum of ten thousand dollars in trust for the following purposes." On the marriage of either of the two sons, then unmarried, the trustees were directed to pay "to his wife one-half of said trust fund and the balance to the wife of the other son when he shall have married." The words "trust fund" refer to the specified fund of \$10,000. Even without these words the trustees could only hold this sum in trust and the sum would be a trust fund. The argument to support defendant's contention seems to rest upon

The provision in the will for the widow, with an interest

therein, is as follows:

"I, as a father of affection for my daughter, Elizabeth Jane
Good, do give and bequeath to her the sum of five thousand
dollars (Five thousand) to be paid to her and her heirs
after my death. It is my wish that she be comfortably
provided for my daughter Jane to pay said sum, who shall be
entitled to interest thereon from that date until it is paid,
payable semi-annually."

It is a fair presumption that if Robert had been and Elizabeth

been married at the time this payment was made and each of them

were would have received \$2500 as did Elizabeth Jane Good, it is

inimpossible to suppose that the testatrix intended that any

estate which would provide a larger sum. The testatrix clearly

intended that the sum which would be paid to her should be

larger than that of the other daughters-in-law had received; it

is contrary to the evident intention of the testatrix to treat all

her children alike that Elizabeth's wife should receive \$2500, the

wife of Charles approximately \$2500, and the wife of Robert, it may

approximately \$2500 on her wedding day. It is clear that Robert

did not intend that the testatrix intended to give the same amount

to each of her daughters-in-law as a token of her affection.

Defendant's argument tends largely to the use of the word

"prudent" in the context of the will which is inadvisable, and

it is said that there would likely not only the \$2500 principal but

the accumulated income thereon. If the will the executor may

therefore give "the sum of ten thousand dollars in trust for

the following purposes." In the marriage of Robert and Jane

then unmarried, the trustees were directed to pay "to the wife and

half of said trust fund and the balance to the wife of the other

and then the shall have married." The words "said trust" refer to

the vested fund of \$10,000. Even without those words the trustee

would only hold this sum in trust and the sum would be a trust fund.

The argument to support Defendant's contention seems to rest upon

the fallacious assumption that merely because the words "trust fund" are used, that accumulated income is included. We do not understand that these words give a larger meaning to the sum of money, \$10,000, bequeathed.

The provision of the will in question contains no words touching any accumulations of income. The sole bequest is the sum of \$10,000. We find, however, in paragraph "e", bequeathing to the daughter-in-law Eleanor, \$5000, a specific direction for the payment of interest, provided she should not receive the bequest until after one year from the date of testatrix's death, when she would be entitled to interest. Paragraph "f" contains no language touching interest.

Another consideration is, that the will contains various provisions for the expenditure by the executors and trustees of the income from the estate, like maintaining a home for her sons, paying a housekeeper's salary, "materials, provisions and other things;" also taxes and insurance. Hence the testatrix specifically provided (par. 12) that if at any time the income should be insufficient for these purposes then the executors and trustees "may use so much of the principal sum as may be needed therefor." Clearly, these provisions contemplate that the trustees should receive the entire income from any and all of the trusts created by the will.

The bequests under consideration are contingent both as to the time and the event upon which they shall take effect, and as to the identity of the beneficiaries. There is abundant authority holding that in such a case the intermediate income is not a part of the gift but belongs to the residuary estate. Sandford v. Blake, 45 N. J. Eq. 247, involved the question whether the income from one-half of the amount bequeathed which accrued from the death of the last surviving brother and until the death of the testator's sister

The following provisions have been inserted in the will "and" are used, that substituted clause is inserted. As the will understood that these words give a larger meaning to the sum of money, \$10,000, deposited.

The provision of the will in question contains no words indicating any accumulation of income. The sole purpose is for the sum of \$10,000. To that, however, in paragraph "B", deposited in the daughter-in-law's account, \$1000, a specific direction for the payment of interest, provided and should not receive the payment will often not pay from the date of testator's death, when the will is to be paid in interest. Paragraph "C" contains no further income provision.

Another consideration is, that the will contains various provisions for the payment by the executor and trustee of the income from the estate, like maintaining a home for her son, paying a business's salary, providing for the education and support of his son and daughter. Under the trustee's authority is provided (par. 15) that if at any time the income should be insufficient for these purposes then the executor and trustee may use as much of the principal sum as may be needed therefor. Clearly, these provisions indicate that the trustee should receive the entire income from any and all of the funds created by the will.

The purpose of the consideration are contingent upon the time and the event upon which they shall take effect, and as to the identity of the beneficiaries. There is no doubt as to the fact that in such a case the income is not a part of the gift but belongs to the beneficiary named. Smith v. Smith, 12 N. E. 2d 217, decided the question whether the income from the gift of the money deposited which accrued from the death of the last surviving husband and until the death of the testator's sister

should occur, belonged to her as residuary legatee, or to her children, who had become entitled to the corpus of the fund in default of appointment under her last will. It was held that the income passed under the residuary clause of the will, the court saying that as the income was given to the testator's two brothers and the survivor of them during life, and the principal ^{to be} paid to the children upon the death of the sister, "there being no directions for the accumulation of income to increase the corpus of the fund, the income accruing between the death of the surviving life-tenant and the death of Eleanor (the sister) is undisposed of and falls into the residue."

Jarman on Wills (5th ed.) Vol. 1, p. 756, says:

"A residuary gift of personal estate carries not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee; for a testator is supposed to give his personality away from the former only for the sake of the latter. It has been said, that, to take a bequest of the residue out of the general rule, very special words are required, and accordingly a residuary bequest of property 'not specifically given,' following various specific and general legacies, will include lapsed specific legacies."

In Cashman v. Horton, 59 N. Y. 149, the testator bequeathed to his sister the income from \$2000, and upon her decease the \$2000 was bequeathed to "the lawful heirs" of the testator's brother; the brother survived both the testator and the sister. It was held that as the lawful heirs of the brother could only be known at his death, the gift was therefore contingent, and the interest on the \$2000 accruing between the death of the sister and the death of the brother belonged to the residuary legatee. In Harris v. Lloyd, 1 Turner & Russell (Eng. Ch.) 310, where a sum of money was left in trust for the benefit of a child or children of the testator's son, who at the time of the testator's death had no children, it was held that until there should be a child the interest upon the sum should fall into the residue, the court saying that "where there is an interval in which the interest is not disposed of expressly by the will, before

about noon, belonged to her as residuary legatee, or to her child-
ren, who had become entitled to the corpus of the fund in default of
appointment under her last will. It was held that the income ceased
under the residuary clause of the will, the court saying that as
the income was given to the testator's two sisters and the survivor
of them during life, and the trustees had no discretion upon the
basis of the sister, "there being no discretion for the appointment
of income to increase the corpus of the fund, the income provided
between the death of the surviving life-tenant and the death of
himself (the sister) is understood to fall into the residue."
James on Wills (4th ed.) Vol. 1, p. 708, says:
"A residuary gift of personal estate creates not only every-
thing not in being at the death of the testator, but everything that is the subject
of a power and is not well disposed of. A residuary clause for the
residuary legatee creates every one except the residuary legatee;
for a residuary bequest is intended to give his personalty away from the
testator with the view of his estate. It has been said, 'but, be-
cause a bequest of the residue out of the personal estate, very special
words are required, and accordingly a residuary bequest of property
'not specifically given,' following various specific and general
bequests, will include residuary legacies.'"
In Bartholomew v. Bartholomew, 10 N. D. 361, the testator bequeathed
to his sister the income from \$2000, and gave her residence and land
and furniture in the latter part of his will. It was held that
brother survived both the testator and the sister. It was held that
as the sister's share of the income could only be taken at the death,
the gift was therefore contingent, and the sister was the residuary
beneficiary between the death of the sister and the death of the brother.
In Bartholomew v. Bartholomew, 10 N. D. 361, 111 N. W. 251, 111
N. D. 361, 111 N. W. 251, 111 N. D. 361, 111 N. W. 251, 111 N. D. 361,
the father of a child or children of the testator's son, who at the
time of the testator's death was an illegitimate child, it was held that until
such time as the father was legitimated and the mother legitimated
the residue, the court saying that "where there is an interval in
which the father is not legitimated by the will, the child

the persons come into existence who are to take the capital, the interest falls into the residue." The question is stated in Kales Bequest Future Interests, (2nd ed.), p. 214, namely, "What then is to become of the rents and profits or intermediate income prior to the time the gift after the death of A (the testator) takes effect?" - and says (sec. 206), "If the subject matter of the devise be specific lands or specific personal property, there is an intestacy or the residuary devisee or legatee is entitled," citing cases.

We do not understand that Brown v. Wright, 168 Mass. 506, cited by defendant, is contrary to what we have just said. In that case it was held that the son of the testator should receive only the income of a specified sum pursuant to directions in the will and not income accruing from the balance of the estate. Neither is Male v. Williams, 48 N. J. Eq. 33, in point, for there the testator specifically directed that the interest should follow the legacy.

Neither are decisions in point where the testator bequeathed in trust a specified sum for the benefit of a named person without mentioning the income from this fund. Manifestly, under such conditions the testator clearly intended that the income from the bequeathed sum should be paid to the legatee.

We do not give weight to the argument that the purpose of the testatrix with respect to the bequests in question was to induce the sons to marry, and that to put the income in the residuary estate which goes to them tends to defeat the inducement to marry. As we have said before, the gift was intended as a token of affection to the wives of the testatrix's sons. There is force in the statement of counsel for the complainant that the small annual income to each son of the \$10,000 bequeathed would hardly be an inducement to postpone marriage.

There is no merit in the point that to deprive the wives of the accumulated income would produce inequality. This argument is

the person who has been named, the
lastest this into the evidence. The question is stated in the
person of the witness, (and ed.) "What was the
to know of the facts and profits of the business in question
the time the gift was made of A (the witness) from the
and says (see, too), "If the subject matter of the gift is specific
based on specific personal property, there is no liability on the
voluntary transfer of property as required." (see, too, 100
to be not understood that William T. Williams, 100 Mass. 100,
called by defendant, is contrary to what we have just said. In
that case it was held that the man of the defendant should receive
only the income of a specified sum pursuant to directions in the
will and not income exceeding the sum of the income of the business
to William T. Williams, 100 Mass. 100, in point, for there and there
the testimony showed that the income was to be paid to the
business was decided in point where the transfer was made
in trust a specified sum for the benefit of a named person without
limiting the income from this fund. Similarly, where the sum
from the transfer clearly intended that the income from the bus-
ness was to be paid to the income.
We do not give weight to the argument that the purpose of the
testator was to give to the person in question the so much the
sum to marry, and that to put the income in the voluntary estate
which goes to show that to defeat the instrument so much. In we
have said before, the gift was intended as a form of protection to
the wife of the testator's son. There is force in the statement
of counsel for the complainant that the small annual income is not
one of the \$10,000 bequest which would hardly be an inducement to mar-
riage.
There is no merit in the point that to deprive the wife of
the annual income would be unjust. This argument is

based on the provision in the will that Eleanor B. Coit was to receive interest on her bequest, and therefore, it is said, defendant also should receive interest. Eleanor Coit's legacy was due and payable to her one year after the death of the testatrix and the will provided that if it was not then paid she should receive interest from that date. No interest was to be paid her prior to the due date. The gift to defendant was not payable until the date of her marriage and was paid on that date.

It is also said that if the testatrix intended the income of the trust fund to go to the residuary legatees she would have said so in her will. The will appoints trustees of all the trusts created and directs them how to use the income therefrom without distinguishing between the trusts. Moreover, if the testatrix intended the income of this trust fund to go to the prospective daughters-in-law, why was it not so provided in the will? We think the will was drawn as it was having in mind that a gift of a specific legacy to take effect in the future upon a contingency which may never happen, does not carry with it the intermediate interest where the will contains a residuary clause, unless the testator otherwise specifically provides.

We have considered the other points contained in the able brief by counsel for the defendant but there is nothing presented which persuades us from the conclusion that the testatrix intended that her respective daughters-in-law should receive \$5000 and no more, and that the income from the trust fund in question should go into the residuary estate.

For the reasons indicated we hold that the decree of the chancellor is proper, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

Noted on the question in the will that William H. Hall was to have
active interest in the business, and that, in fact, he was to have
and also would receive interest. William Hall's interest was not
and payable to him and upon the death of the testatrix and
the will provided that it was not to be paid until the testatrix
interest from that date. The interest was to be paid her share in
the business. The gift to the testatrix was not payable until the
date of her marriage and was paid on that date.

It is also said that if the testatrix intended the income
of the trust to go to the residuary legatee and that there
was to be no will. The will appoints trustees of all the income
excepted and directs them to pay the income therefrom without
disturbance between the income. However, at the testatrix
intended the income of this trust to go to the prospective
legatee-in-law, why was it not so provided in the will? We think
the will was drawn as if you having in mind that a gift of a residuary
interest is held either in fee simple or a residuary with the
power to sell, does not carry with it the interest in the property
the will contains a residuary clause, which the residuary legatee
necessarily receives.

We have considered the other points contained in the will
briefly by counsel for the defendant but there is nothing presented
which requires us to do the same. The testatrix intended
that her prospective legatee-in-law should receive the income
thereof, and that the income from the trust fund in question should go
into the residuary estate.

For the reasons indicated we hold that the intent of the
testatrix is clear, and is as follows.

WITNESSED my hand and seal this 1st day of January, 1911.

37775

ANNA OLSON,
Appellant,

vs.

SOUTH CHICAGO SAVINGS BANK,
a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 627²

MR. JUSTICE McGUIRE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a suit in assumpsit to recover \$5037.50, the alleged value of 100 shares of Union Carbide and Carbon Corporation stock which at one time had been pledged with defendant as collateral to a loan; when the loan was paid these shares were not returned to plaintiff; upon trial by a jury the verdict was for the defendant and plaintiff appeals from the judgment that she take nothing.

The question presented is largely one of fact. Defendant admits that at one time it held the shares of stock in question as part of the collateral to a loan made to plaintiff but says that these shares were turned over to James Collins, defendant's cashier and vice-president, for his personal use, with the consent and under the directions of the plaintiff, and pledged by Collins with the Continental Illinois Bank and Trust Company on its loan to him and sold by that bank.

Did plaintiff consent that Collins could use the shares of stock for his own private and personal use? It would too much lengthen this opinion to narrate all the details touching the transaction. Plaintiff was a professional nurse but was also an active dealer in stocks; most of her banking transactions were with the defendant bank; she purchased stocks on the advice of friends and seems to have been well posted as to values; she was the owner of quite a list of well known stocks.

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October 1, 1930, she owed defendant \$80,000, with 600 shares of Union Carbide and Carbon Corporation stock pledged as collateral security; most of her dealings at the bank were with Collins, a neighbor whom she had known for about thirty years; he had been employed by defendant bank since 1902 and in 1930 had acquired 45 shares of defendant bank stock. At this time he was indebted to Sophie Bokman on his note for \$13,000, and she sold some of Collins' bank stock as collateral; in November, 1930, Mrs. Bokman delivered this note with the collateral to Guy Nelson, an assistant cashier of defendant's bank, for the purpose of collecting it from Collins. Collins knew one of the vice-presidents of the Continental Illinois Bank and Trust Company and wrote to him, asking the Continental bank to lend him \$13,000 for the purpose of refinancing his obligation to Mrs. Bokman; he offered to deposit as collateral these shares of stock of the defendant bank, and also said he would "probably be able to add 100 shares Union Carbide and Carbon Corporation;" to this the Continental bank replied, on November 17, 1930, that they would be glad to make the loan of \$13,000, secured by the shares of stock of the defendant bank and 100 shares of Union Carbide stock.

October 1, 1930, plaintiff had renewed her loan with defendant bank; she made a note for \$19,800 and listed 600 shares of Union Carbide stock as security; at the same time defendant made out what is called a collateral register card, which is used to keep a record of customers' collateral; this card also listed 600 shares of Union Carbide stock in the name of plaintiff.

December 1, 1930,^{as} plaintiff testified, she had a conversation with Collins. As Collins was dead at the date of the trial, plaintiff is the only living witness to this conversation. She says Collins asked her "if he could use 100 shares of my Union Carbide for a short time;" she replied that she didn't like to do it as she used the Union Carbide stock for collateral on her own loan; that

October 2, 1936, was over telephoned 700,000, with 600,000 shares of Union Pacific and Eastern Corporation stock pledged as collateral security; most of her holdings at the time were with Union Pacific, and she had known for about thirty years; he had been employed by defendant from 1921 and in 1936 had acquired an interest of defendant from stock. At this time he was indebted to Joseph Brown in his wife for \$15,000, and was held as a collateral stock as collateral; in November, 1936, Mrs. Brown delivered this note with the collateral to Jay Brown, an assistant manager of defendant's bank, for the purpose of collecting it from Union Pacific. Brown knew one of the vice-presidents of the defendant Union Pacific Bank and Trust Company and wrote to him, asking the defendant bank to loan him \$15,000 for the purpose of collecting his obligation to Joseph Brown; he offered as security an collateral stock owned by stock at the defendant bank, and also he would "pledging to him 25 and 100 shares Union Pacific and Eastern Corporation," to him the defendant bank replied, on November 27, 1936, that they would be glad to make the loan of \$15,000, secured by the shares of stock of the defendant bank and 100 shares of Union Pacific stock.

October 2, 1936, defendant had received from Jay Brown interest on bank; she gave a note for \$15,000 and listed 600,000 shares of Union Pacific stock as security; at the same time defendant made out and is called a collateral receipt card, which he used to have a receipt of mortgage; collateral; this card also listed 600,000 shares of Union Pacific stock in the name of Joseph Brown.

October 2, 1936, defendant delivered, with a check, section with Union Pacific. He called was held as the base of the trial, defendant is the only living witness to this conversation. The only witness named was "it is said that Jay Brown of Jay Union Pacific for a short time," and replied that she didn't like to do it as she had the Union Pacific stock for collateral on her own loan; that

Collins then said, "The bank takes care of me and they stood back of me. I had nothing to fear whatsoever about my stock." Apparently plaintiff assented to this request and Collins wrote out a receipt for this stock, signing his own name. It recites that he has received from plaintiff 100 shares Union Carbide stock "with power to hypo stock power - to be returned to her on ten days' notice." This receipt was given to plaintiff and has been in her possession since then. At the same time the collateral register card listing plaintiff's certificates of stock in the Union Carbide and Carbon Corporation, pledged as collateral to her loan from the bank, shows that plaintiff signed on the same day a withdrawal receipt for 100 shares of Union Carbide stock. Plaintiff admits she signed this. On the same day plaintiff also signed a paper called "Owner's consent," which is a printed form addressed in conspicuous type to "Continental Illinois Bank and Trust Company of Chicago;" it authorized James Collins to hypothecate, pledge and deliver the securities described, belonging to the undersigned, (the plaintiff) and agreed that when so hypothecated such collateral shall be held to secure any indebtedness owing by the debtor (Collins) to the Continental bank, and that said securities shall be subject to disposition in accordance with the terms and conditions of the instruments evidencing such indebtedness. The collateral security written in describes the certificate for 100 shares of the Union Carbide Corporation. Plaintiff admitted she signed this consent.

While on the stand plaintiff, admitting that she signed both the withdrawal receipt on the collateral register card and the owner's consent authorizing Collins to hypothecate her Union Carbide stock, attempted to throw some doubt as to the time when she signed these papers, and testified she didn't see the printed heading on the owner's consent paper, addressed to the Continental bank. However, the jury was fully justified in believing that she signed these

papers on the date they bear, that she was fully conversant with the English language, and knew their contents.

On this same date, December 1, 1930, the stock certificate in question, pursuant to the consent of plaintiff, was delivered by defendant bank to Collins.

Then followed a number of bookkeeping transactions which it is unnecessary to note in detail. They resulted in the Continental bank receiving Collins' note for \$13,000, together with the collateral which included the 100 shares of Union Carbide stock Collins had obtained with the consent of plaintiff, and the payment, on the other hand, of Collins' note payable to Mrs. Bokman. Respective counsel have set forth these steps quite fully, and from them plaintiff attempts to support her claim that defendant bank profited by the transaction. The evidence does not justify this claim.

Collins' objective was to secure funds to meet his note held by Mrs. Bokman. For this purpose he secured a loan from the Continental bank, borrowing from plaintiff her certificate of Union Carbide stock to be used as collateral on his note to the Continental bank, which made the loan which paid Mrs. Bokman. The jury could properly conclude that this entire transaction was private and personal between plaintiff, Collins, the Continental Bank and Mrs. Bokman, and that defendant bank did not profit from it.

January 2, 1931, plaintiff arranged with an assistant cashier, Kriewitz, to renew her loan with defendant bank; Kriewitz wrote out a new note, specifying only 500 shares of Union Carbide stock as collateral, instead of 600; Kriewitz testified that plaintiff looked it over and signed it without saying anything about 100 shares being missing. Plaintiff never inquired of anyone about her Union Carbide stock until Collins' death, which occurred March 16, 1931. She testified she was satisfied to hold his receipt for her stock.

A day or two after Collins' death she showed his receipt to Guy Nelson, a vice-president of defendant, and asked how she could

There is no doubt that the above information is correct and that the same is being furnished to the proper authorities for their consideration.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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in person, pursuant to the consent of counsel, was delivered by
attorneys to the bank in Dallas.

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is necessary to note in detail. They resulted in the condition

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It is noted that the above information is confidential and should be kept as such.

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George Washington and Elizabeth Adams, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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get her certificate for the 100 shares of Union Carbide stock, and was told he had no knowledge of it but would speak to Mrs. Collins concerning it; then followed interviews with Mrs. Collins in which Nelson ascertained the facts. Mrs. Collins indicated a willingness to do everything possible to save plaintiff's stock, but she herself was without sufficient funds for this purpose. At one time Nelson succeeded in a plan whereby Mrs. Collins, out of her insurance money, could pay off a loan which would release certain shares of stock held as collateral, provided the Continental bank would accept said shares as additional security to Collins' note. The evidence shows that although the Continental bank at one time agreed to this they did not go through with it. Plaintiff had interviews with Mrs. Collins in an attempt to arrive at some arrangement whereby plaintiff could recover her shares of Union Carbide stock.

July 15, 1931, the Continental bank sold the 100 shares of Union Carbide stock for \$5041 and credited Collins' note with this. Defendant bank did not receive any of the proceeds of this sale.

In the meantime plaintiff continued to transact business with defendant bank; she testified it was not until after the Continental bank had sold the Union Carbide stock that she first had the idea that she would try to hold defendant bank for this stock.

The case went to the jury in two counts, which are in assumpsit, the first of these alleging that the certificate was delivered to Collins by defendant without any authority therefor given by plaintiff; the other count charges violation of a pledge by defendant to return the stock when plaintiff's note was paid. The jury properly found that the certificate of stock was delivered by defendant to Collins with the consent and permission of plaintiff. Plaintiff therefore failed to prove any breach of contract by defendant, for if the certificate was delivered to Collins with the consent of plaintiff, there could be no breach of contract by defendant.

not her possession for the purpose of Union Pacific stock, and
was said to have no knowledge of it and would agree to let Collins
concerning it; then followed conversation with Mrs. Collins in which
Collins mentioned the stock. Mrs. Collins testified a witness
to the conversation possible to have obtained it's stock, but she herself
was without sufficient funds for this purpose. At one time Collins
mentioned in a conversation with Collins, but of her intention to
sell her stock for a loan which would release certain shares of stock held
as collateral, provided the Continental bank would accept said shares
as additional security to Collins' note. The evidence shows that
although the Continental bank at one time agreed to this they did not
in January with it. Finally had conference with Mrs. Collins in an
attempt to arrive at some arrangement whereby plaintiff could recover
her shares of Union Pacific stock.

July 12, 1931, the Continental bank sold the 100 shares of
Union Pacific stock for \$2250 and credited Collins' note with said
amount. Bank did not receive any of the proceeds of this sale.

In the meantime plaintiff continued to demand payment from
Continental bank; she testified it was not until after the Continental
bank had sold the Union Pacific stock that she knew that the bank
was going to pay her back the money.

The case went to the jury in two counts, which are in ex-
cess. The first of these alleged that the Continental bank had
delivered to Collins by delivery without any authority therefrom given
by plaintiff; the second count charges violation of Article 10 of the
Constitution to receive the stock when plaintiff's note was paid. The jury
properly found that the evidence of stock was delivered by bank
and to Collins with the consent and participation of plaintiff. Finding
that therefore failed to prove any breach of contract by defendant,
and if the verdict was returned in Collins' favor the court at
plaintiff, there could be no breach of contract by defendant.

Plaintiff's brief earnestly argues that the defendant was guilty of fraud or misrepresentation. No allegations to this effect were in the counts upon which the case was tried. Therefore, no evidence was admissible tending to show fraud where no fraud is pleaded. Second Nat'l Bank of Heloit v. Woodruff, 118 Ill. App. 6. Moreover there was no evidence of any fraud or misrepresentation by defendant.

We cannot attempt to note all that is said in plaintiff's brief concerning the transaction between plaintiff and Collins. Her own testimony that Collins requested the shares of stock for his own use for a short time, corroborated by documents which plaintiff signed at the same time, fully justified the jury in finding for the defendant.

Plaintiff complains at considerable length of the action of the trial court with reference to rulings on instructions. We can note these only briefly.

Plaintiff's refused instruction No. 1 is long and complex; it improperly refers to representations made by Collins to plaintiff as being chargeable to the defendant bank; it improperly assumes that the bank had the benefit of the transactions between Collins and plaintiff; it also refers to Collins' interest as hostile to the bank. The court properly refused it.

Plaintiff's refused instruction No. 3 is also objectionable for similar reasons; it is merely an abstract proposition of law, and its refusal was not error.

Plaintiff's refused instruction No. 4 is misleading as telling the jury that if Collins, in dealing with plaintiff, had apparent authority to conduct the transaction with her, and that if plaintiff relied upon such apparent authority, that defendant bank may be held liable. Obviously Collins had authority to conduct a personal transaction on his own account with plaintiff. The instruc-

Plaintiff's brief somewhat states that the defendant was guilty of fraud or misrepresentation. He alleges to this effect that in the course of the case was stated. However, no evidence was submitted to show that there was fraud in the case. Plaintiff's brief also states that the defendant is guilty of fraud or misrepresentation. However, there was no evidence of any kind of misrepresentation by the defendant.

The court attempts to show that in Plaintiff's brief concerning the transaction between Plaintiff and Defendant, the defendant was guilty of fraud or misrepresentation. The court states that the defendant was guilty of fraud or misrepresentation. However, the court also states that the defendant was not guilty of fraud or misrepresentation. The court states that the defendant was not guilty of fraud or misrepresentation. The court states that the defendant was not guilty of fraud or misrepresentation.

Plaintiff complains of considerable length of the action of the trial court with reference to various instructions. He says that the trial court was not correct.

Plaintiff's brief contains the following statement: "It is respectfully requested that the court set aside the judgment of the trial court and grant a new trial." The court states that it is respectfully requested that the court set aside the judgment of the trial court and grant a new trial. The court states that it is respectfully requested that the court set aside the judgment of the trial court and grant a new trial. The court states that it is respectfully requested that the court set aside the judgment of the trial court and grant a new trial.

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tion lacks precision and was properly refused. City of Chicago v. Sutton, 136 Ill. App. 221.

It was proper to refuse plaintiff's instruction No. 6, which tended to throw doubt upon the execution by plaintiff of her signature on the withdrawal collateral register. There was nothing in the evidence to cast any doubt upon the genuineness of plaintiff's signature. She herself so testified.

Among the objections to plaintiff's refused instruction No. 7 is that it repeats the assumption that Collins' interests were adverse or hostile to the defendant. There was no basis for this. We have noted only a few of the objectionable features which justified the trial court in refusing these instructions tendered by plaintiff.

It was not error to give defendant's instruction No. 10, which told the jury that to do away with the force of the written receipt of plaintiff for the withdrawal of the stock certificate, "the testimony should be convincing, and the burden of proof rests upon the party attempting the explanation." The rule to this effect is stated in Winchester v. Grosvenor, 44 Ill. 425. See also Baughmuller v. Lampe, 89 Ill. 212. In Vigus v. O'Bannon, 118 Ill. 334, it was held error to refuse an instruction substantially in the same language. Plaintiff makes a number of criticisms against this instruction which have no merit. The instruction does not direct a verdict. If it singles out one document thus giving it undue emphasis, plaintiff's given instructions Nos. 2 and 3 did the same thing. The instruction did not tell the jury that the stock was delivered to plaintiff on a certain day; it merely said that the receipt was evidence of the fact therein recited and that the testimony to overcome its force must be convincing. The instruction is not properly subject to the criticisms made and the court properly gave it.

Defendant's instruction No. 11 was proper. It concisely set forth the issue to be determined by the jury; that is, whether the certificate of stock in question came into the possession of Collins for his personal use with plaintiff's consent, and if the jury should so find the verdict must be for the defendant.

Defendant's given instruction No. 9 was the stock instruction to the effect that plaintiff must prove her case by a preponderance of the evidence.

So, also, defendant's given instruction No. 8 told the jury it had no right to disregard the testimony of an unimpeached witness for defendant merely because said witness was an employee of defendant, but such testimony should be tested by the same principles as the jury would use in determining the credibility of any other witness.

Defendant's given instruction No. 1 is also a stock instruction, which has been approved many times. It told the jury that in considering the testimony of plaintiff the jury should consider her interest in the result of the suit. In O. & N. I. S.R.Co. v. Burridge, 211 Ill. 9, it was held reversible error to refuse to give a similar instruction. See also North Chicago St. R.R.Co. v. Welner, 206 Ill. 272.

Defendant's given instruction No. 13 merely stated the issue to be determined by the jury as to whether plaintiff consented to the delivery of the certificate of stock to Collins for his personal use,

Complaint is made of the rulings of the trial court with reference to testimony, but we find nothing in this respect of sufficient importance to require a reversal.

The question to be determined was simple. The evidence was convincing in favor of the defendant. There were no prejudicial errors upon the trial. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

Defendant's instruction no. 11 was proper. It was merely to
tell the jury to be determined by the jury; that is, without the
conflict of the fact is question come into the possession of William
for his personal use with defendant's consent, and if the jury should
so find the verdict must be for the defendant.

Defendant's given instruction no. 9 was the same instruction
as the other two, although with some words of a different
of the evidence.

It, also, defendant's given instruction no. 8 was the same
it was not right to disregard the testimony of an unimpeached wit-
ness for defendant's purely personal will without any evidence of
defendant, but such testimony should be treated by the same principle
as the jury would use in determining the credibility of any other
witness.

Defendant's given instruction no. 10 was the same instruc-
tion, which has been approved many times. It told the jury that in
considering the testimony of plaintiff the jury should consider the
interest in the result of the case. In State v. Smith, 100
Miss. 211, 212, it was held reversible error to refuse to give a
similar instruction. See also State v. Smith, 100 Miss. 211, 212.

Defendant's given instruction no. 12 was the same as the
as he instructed by the jury as to whether defendant was guilty of the
deficiency of the evidence he stated in writing for his personal use.
Instruction is made of the nature of the trial court with ref-
erence to testimony, but we find nothing in this record of error
therein as to giving a verdict.

The verdict is for defendant and should be entered and
conforming to the law of the defendant. There was no prejudicial
error upon the trial. The judgment is therefore affirmed.

AFFIRMED.

37845

EGNAT PHILIPS,
Appellee,

vs.

CHARLES FRANDER,
Appellant.

58 17
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 627²

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of \$725 entered after trial by the court in an action of fraud and deceit. Consideration of the facts leads to the conclusion that the finding and judgment of the trial court were justified.

The defendant purported to own a furnished rooming house at 925 Leland avenue in Chicago; he advertised it for sale and plaintiff interviewed him with regard to the matter. The evidence tended to show that defendant represented that the income from the house was \$395 a month; plaintiff agreed to buy for \$725 and paid \$50 on account, subsequently paid the balance of the purchase price and April 10, 1934, received from defendant a bill of sale conveying the furniture and chattels in the premises.

Plaintiff moved into the building April 11th but six days thereafter through his attorney he wrote to defendant claiming that plaintiff had been persuaded to buy the property through fraudulent representations made by defendant, and the return of the purchase money was demanded; another letter to the same effect was written to defendant April 26th in which it was stated that plaintiff elected to rescind the contract of sale on account of misrepresentations and also because there was a shortage in certain articles of furniture, equipment and utensils; a demand was again made for a refund of the purchase price - \$725, and the furniture and equipment were tendered to defendant.

The evidence showed that the actual income from the business was \$221 a month instead of \$395 as represented by the defend-



RECEIVED
 MAY 10 1934
 U.S. DEPARTMENT OF JUSTICE
 DIVISION OF INVESTIGATION

J. A. 627

IN RE: JAMES EARL RAY, ALIAS; ET AL.

Subscribed and sworn to before me this 10th day of May, 1934, at St. Louis, Missouri.

I, the undersigned, being a duly qualified and authorized officer of the Federal Bureau of Investigation, do hereby certify that the foregoing is a true and correct copy of the original report of Special Agent in Charge, St. Louis, dated and captioned as above.

Very truly yours,
 J. Edgar Hoover
 Director

Special Agent in Charge, St. Louis

Subscribed and sworn to before me this 10th day of May, 1934, at St. Louis, Missouri.

I, the undersigned, being a duly qualified and authorized officer of the Federal Bureau of Investigation, do hereby certify that the foregoing is a true and correct copy of the original report of Special Agent in Charge, St. Louis, dated and captioned as above.

Very truly yours,
 J. Edgar Hoover
 Director

Special Agent in Charge, St. Louis

ant. It was also proven that there was a shortage of certain articles of furniture and equipment.

Serious trouble for plaintiff was caused by Mrs. Pfender, wife of defendant. She occupied an apartment in the building. She testified that she owned the premises in joint tenancy with her husband, although in the bill of sale defendant vouched himself to be the owner of the property with full power to sell. It is a fair inference that Mrs. Pfender did not concur in the sale by her husband to plaintiff for she continued in the premises and to exercise acts of ownership of the premises. She collected rent from some of the tenants and told them not to pay plaintiff but to pay her.

It was stated by counsel on the trial that defendant and his wife had separated and that she had filed a bill for divorce. This tends to explain her actions indicating non-concurrence in the sale. In any event plaintiff was prevented by defendant's wife from exercising undisturbed possession of the premises.

Plaintiff agreed to pay \$192.50 a month rental for the premises and paid one month's rent. He collected a small portion of the income, which, he testified, he expended in making repairs. It is also in evidence that Pfender distrained on the furniture for non-payment of rent and had judgment in the distress suit against Phillips.

The trial court correctly stated the situation, noting that plaintiff had paid defendant \$725 for the business, including furniture, and \$192.50 as rent; that he collected very little money from the business as the wife of defendant made collections and thus tied up the income. Plaintiff in the meantime has lost the furnishings through the distress suit. We are of the opinion the trial Judge did justice in his findings.

Defendant says that the court improperly excluded certain evidence. Defendant sought to show by a law student in the office

of the attorney for plaintiff that plaintiff had said that defendant's representation was an income of \$500 a month, and that this amount was stated in the plaintiff's statement of claim, while plaintiff testified that the representation was \$395 a month. We do not think the testimony of the witness was material. The statement of claim speaks for itself.

Complaint is made that the court should not have sustained an objection to the certified copy of the judgment in the municipal court in the distress suit brought by Pfander against Phillips, but apparently, from his observations made in connection with his findings, this record was considered by the court.

Defendant's brief is largely taken up with technical points as to pleading and proof, none of which in our opinion is sufficiently important to require a reversal. The plaintiff, through misrepresentations, parted with his money and has nothing to show for it, while the defendant after distraining the furniture is in the same position as before the sale, plus the \$725 which he received from plaintiff.

We hold that the judgment for this amount was properly entered, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

at the hearing the plaintiff had already had this fact known
 and the defendant was not aware of it at that time, and this
 would not affect the plaintiff's claim of injury, which
 plaintiff admitted that the defendant was not a party to
 it and that the defendant of the claim was necessary. The
 defendant of claim was not liable.

Consequently it was held that the claim should not be considered
 as decided in the plaintiff's favor of the defendant in the plaintiff
 case in the district court through by plaintiff against plaintiff, and
 accordingly, from the defendant's claim in connection with this
 finding, this finding was considered by the court.

Defendant's claim is largely based on the defendant's
 claim as to plaintiff and other, none of which in our opinion is
 sufficiently important to require a reversal. The plaintiff,
 through defendant's claim, would also have been considered
 as part of it, while the defendant's claim against the plaintiff
 is in the same position as before the case, the fact which is
 reversed from plaintiff.

It is held that the judgment of the court was reversed,
 affirmed, and it is affirmed.

Witness my hand and seal of office at the City of New York,
 this 10th day of June, 1900.

37594

CHARLES C. MORGENTHAU and
MARIE MORGENTHAU,
Appellees,

v.

MIDLAND OIL COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

279 I.A. 627⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case to recover damages for the partial destruction by fire of plaintiffs' garage, and upon trial by jury, there was a verdict for plaintiffs, with damages in the sum of \$3,500, upon which judgment was entered.

The declaration in the first count alleged that defendant, through its agent, was delivering gasoline into a submerged tank for storage on premises owned by plaintiffs, and was bound to exercise ordinary care; that defendant knew or ought to have known that the gas was liable to ignite and burn the building; that the gas was delivered in such a negligent manner that it ran over upon the floor of the building situated on the premises, and being highly inflammable, as defendant knew, ignited and destroyed the garage, situated without fault on the part of plaintiffs.

The second count charged that defendant wilfully and wantonly permitted the gasoline to overflow from the submerged tank; that the premises took fire and burned as ^adirect result.

Defendant filed a plea of the general issue and a special plea that the gasoline was not delivered by anyone who was the agent or servant of defendant.

578 A.I. 185

THE UNIVERSITY OF CHICAGO

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and, through the agency, the delivering machine into a substation.

Journal of Management Education 37(6) 689-704

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1947-48, 1948-49, 1949-50, 1950-51, 1951-52, 1952-53, 1953-54, 1954-55, 1955-56, 1956-57, 1957-58, 1958-59, 1959-60, 1960-61, 1961-62, 1962-63, 1963-64, 1964-65, 1965-66, 1966-67, 1967-68, 1968-69, 1969-70, 1970-71, 1971-72, 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, 1989-90, 1990-91, 1991-92, 1992-93, 1993-94, 1994-95, 1995-96, 1996-97, 1997-98, 1998-99, 1999-00, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, 2022-23, 2023-24, 2024-25, 2025-26, 2026-27, 2027-28, 2028-29, 2029-30, 2030-31, 2031-32, 2032-33, 2033-34, 2034-35, 2035-36, 2036-37, 2037-38, 2038-39, 2039-40, 2040-41, 2041-42, 2042-43, 2043-44, 2044-45, 2045-46, 2046-47, 2047-48, 2048-49, 2049-50, 2050-51, 2051-52, 2052-53, 2053-54, 2054-55, 2055-56, 2056-57, 2057-58, 2058-59, 2059-60, 2060-61, 2061-62, 2062-63, 2063-64, 2064-65, 2065-66, 2066-67, 2067-68, 2068-69, 2069-70, 2070-71, 2071-72, 2072-73, 2073-74, 2074-75, 2075-76, 2076-77, 2077-78, 2078-79, 2079-80, 2080-81, 2081-82, 2082-83, 2083-84, 2084-85, 2085-86, 2086-87, 2087-88, 2088-89, 2089-90, 2090-91, 2091-92, 2092-93, 2093-94, 2094-95, 2095-96, 2096-97, 2097-98, 2098-99, 2099-00, 2100-01, 2101-02, 2102-03, 2103-04, 2104-05, 2105-06, 2106-07, 2107-08, 2108-09, 2109-10, 2110-11, 2111-12, 2112-13, 2113-14, 2114-15, 2115-16, 2116-17, 2117-18, 2118-19, 2119-20, 2120-21, 2121-22, 2122-23, 2123-24, 2124-25, 2125-26, 2126-27, 2127-28, 2128-29, 2129-30, 2130-31, 2131-32, 2132-33, 2133-34, 2134-35, 2135-36, 2136-37, 2137-38, 2138-39, 2139-40, 2140-41, 2141-42, 2142-43, 2143-44, 2144-45, 2145-46, 2146-47, 2147-48, 2148-49, 2149-50, 2150-51, 2151-52, 2152-53, 2153-54, 2154-55, 2155-56, 2156-57, 2157-58, 2158-59, 2159-60, 2160-61, 2161-62, 2162-63, 2163-64, 2164-65, 2165-66, 2166-67, 2167-68, 2168-69, 2169-70, 2170-71, 2171-72, 2172-73, 2173-74, 2174-75, 2175-76, 2176-77, 2177-78, 2178-79, 2179-80, 2180-81, 2181-82, 2182-83, 2183-84, 2184-85, 2185-86, 2186-87, 2187-88, 2188-89, 2189-90, 2190-91, 2191-92, 2192-93, 2193-94, 2194-95, 2195-96, 2196-97, 2197-98, 2198-99, 2199-00, 2200-01, 2201-02, 2202-03, 2203-04, 2204-05, 2205-06, 2206-07, 2207-08, 2208-09, 2209-10, 2210-11, 2211-12, 2212-13, 2213-14, 2214-15, 2215-16, 2216-17, 2217-18, 2218-19, 2219-20, 2220-21, 2221-22, 2222-23, 2223-24, 2224-25, 2225-26, 2226-27, 2227-28, 2228-29, 2229-30, 2230-31, 2231-32, 2232-33, 2233-34, 2234-35, 2235-36, 2236-37, 2237-38, 2238-39, 2239-40, 2240-41, 2241-42, 2242-43, 2243-44, 2244-45, 2245-46, 2246-47, 2247-48, 2248-49, 2249-50, 2250-51, 2251-52, 2252-53, 2253-54, 2254-55, 2255-56, 2256-57, 2257-58, 2258-59, 2259-60, 2260-61, 2261-62, 2262-63, 2263-64, 2264-65, 2265-66, 2266-67, 2267-68, 2268-69, 2269-70, 2270-71, 2271-72, 2272-73, 2273-74, 2274-75, 2275-76, 2276-77, 2277-78, 2278-79, 2279-80, 2280-81, 2281-82, 2282-83, 2283-84, 2284-85, 2285-86, 2286-87, 2287-88, 2288-89, 2289-90, 2290-91, 2291-92, 2292-93, 2293-94, 2294-95, 2295-96, 2296-97, 2297-98, 2298-99, 2299-00, 2300-01, 2301-02, 2302-03, 2303-04, 2304-05, 2305-06, 2306-07, 2307-08, 2308-09, 2309-10, 2310-11, 2311-12, 2312-13, 2313-14, 2314-15, 2315-16, 2316-17, 2317-18, 2318-19, 2319-20, 2320-21, 2321-22, 2322-23, 2323-24, 2324-25, 2325-26, 2326-27, 2327-28, 2328-29, 2329-30, 2330-31, 2331-32, 2332-33, 2333-34, 2334-35, 2335-36, 2336-37, 2337-38, 2338-39, 2339-40, 2340-41, 2341-42, 2342-43, 2343-44, 2344-45, 2345-46, 2346-47, 2347-48, 2348-49, 2349-50, 2350-51, 2351-52, 2352-53, 2353-54, 2354-55, 2355-56, 2356-57, 2357-58, 2358-59, 2359-60, 2360-61, 2361-62, 2362-63, 2363-64, 2364-65, 2365-66, 2366-67, 2367-68, 2368-69, 2369-70, 2370-71, 2371-72, 2372-73, 2373-74, 2374-75, 2375-76, 2376-77, 2377-78, 2378-79, 2379-80, 2380-81, 2381-82, 2382-83, 2383-84, 2384-85, 2385-86, 2386-87, 2387-88, 2388-89, 2389-90, 2390-91, 2391-92, 2392-93, 2393-94, 2394-95, 2395-96, 2396-97, 2397-98, 2398-99, 2399-00, 2400-01, 2401-02,

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1. The first of these is the fact that the

Special Agent in Charge

... ..

It is contended for reversal that the proof showed that the gasoline in question was being delivered to the premises of plaintiffs by an independent contractor, for whose action defendant was not responsible; that the fire was caused proximately by the negligence of the tenant in maintaining in the garage a gas heater with an open pilot flame burning; that the damages allowed are so inconsistent with the ~~xxxxx~~ amount proved as to indicate that the jury compromised between the amount of damages and the question of liability, thus preventing a fair trial of the issue of whether defendant was in fact liable.

On this last point defendant says that upon the trial plaintiffs proved an out-of-pocket expense in repairing the garage amounting to \$6,500, and that plaintiff Charles Morgenroth testified to a total damage amounting to \$9,418; that in view of this evidence and the verdict, it is apparent that the question of liability did not receive fair consideration from the jury and that a new trial should have been granted for that reason. Defendant cites Galamopoulos v. Petropoulos, 147 Ill. App. 1; Salamakes v. Victory Ice & Ice Cream Co., 246 Ill. App. 178; Simmons v. Fish, 210 Mass. 563, and many other like cases from different jurisdictions. These cases in substance hold that where the verdict and the judgment are inconsistent with the proofs, and it is apparent that either plaintiffs were entitled to the whole amount claimed or defendant was entitled to a verdict in its favor, a verdict for plaintiffs for an amount less than claimed should be set aside.

None of the cases cited discloses facts such as would bring this case within the rule. Here there were twenty different items of damage, and while the testimony of plaintiffs was uncontradicted by oral testimony the nature of the case was such that the jury had a right to discount the testimony. It may have thought that some of the items were too large. It may have thought that

And, indeed, there is a difference between the two. The first is a difference of degree, the second a difference of kind. The first is a difference of degree in the sense that the two are both of the same kind, but the one is more than the other. The second is a difference of kind in the sense that the two are of different kinds, and the one is not the other.

the practice is suggested as being followed in the opinion of
the Committee by an independent contractor, the latter being defendant
was not responsible; that the Vice was caused principally by the
negligence of the person in retaining in the garage a gas pump
with an open flame burning; that the damage alleged was no
inconsequence with the ~~XXXXX~~ amount proved as to liability; that the
jury compromised between the amount of damage and the question of
liability, thus recovering a fair total of the loss to the
defendant on the facts.

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The above information was obtained from the records of the Department of Social Services, New York City, and is being furnished to you for your information.

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some of the repairs ^{were} unnecessary. It may have thought that the garage repaired was much more valuable than was the building burned. Moreover, the rule is somewhat modified by a line of cases, such as Meyers v. I. C. R. R. Co., 197 Ill. App. 179, holding that a defendant cannot complain that a judgment against him was too small. The trial judge here saw the witnesses and heard the evidence. Apparently, he was of the opinion that the verdict was not one of objectionable compromise, and we are not disposed to say that he erred in that respect, or that the evidence indicates that the jury did not pass upon the question of defendant's liability. There is a suggestion in the argument of defendant that the proximate cause of a fire was the negligence of the tenant of the building in allowing the heater to be placed too close to the gas, but negligence in that respect, even if conceded, would not excuse the negligence of defendant if proved by the evidence.

The close and controlling question in the case is whether the person who delivered the gasoline to the tenant on plaintiffs' premises and who delivered it in a manner to cause the tanks to overflow was the servant or agent of defendant in performing that work. Summarizing the material evidence bearing on that point, it appears that the property which plaintiffs owned was known as 4608-09 South Halsted street in Chicago. In the year 1930 the owners built on the premises a garage which was 30 feet wide and 113 feet long. These premises were leased to the Bates Motor Transport Lines. The tenant took possession October 1, 1930, and remained in possession until the day of the fire, which was November 14, 1932.

The tenant operated a freight trucking business. Up to

of the evidence.

The above was submitted to the Board of Directors of the Bank of America, New York, and was approved by the Board on December 14, 1914.

July, 1931, it received its gasoline from the Sinclair Oil Co., which delivered it into tanks located in the building furnished by the Sinclair Co. About that date a new contract for the purchase of gasoline from the defendant, Midland Oil Co., was entered into, defendant being represented by its president, Mr. Ottenhoff. Under the new arrangement defendant supplied two tanks into which the oil was to be delivered and furnished a "stick," as it was called, by which the oil was measured. The evidence shows that the gasoline was delivered by truck to the tenant by defendant every day and was transferred to the tanks by means of a hose, through which it ran into the fill pipe located just outside the building. The evidence tends to show that the name "Midland Oil Co." in letters six or eight inches high were printed on both sides of the truck. The same inscription appeared on the back of the truck in smaller letters, and no other name, or names, appeared on it. The truck was painted dark green on both sides, and the letters on it were in a kind of white silver. There is also evidence tending to show that the driver of the truck wore a suit bearing the name of the Midland Oil Co., but this is denied. Each day as he delivered the gasoline he also delivered a bill for the same, which was on the regular printed billhead of the Midland Oil Co. The driver would also on each day take the order for the amount of gasoline required for the following day. The delivery of gasoline was discontinued by defendant after the fire. There was some gasoline left in the tanks, and about six days after the fire, Mr. Bates received an envelope addressed to the Bates Motor Transport Line. On the envelope appeared the name of the sender, Midland Oil Co., and within the envelope were writings which appear in evidence as plaintiffs' exhibits 2, 3 and 4, dated November 19, 1931. Exhibit 2 was a printed delivery receipt of the Midland Oil Co., 2205 W. Harrison St., acknowledging receipt of

931 gallons of gasoline and 34 gallons of ethyl. On the receipt in pencil are the words, "Returned for credit," with the signature of the driver of the truck whose name was John Lananga. Plaintiffs' exhibits 3 and 4 are duplicate bills on the billhead of the Midland Oil Co., on which appear in type "Credit memorandum, 931 gallons gasoline at 11c, \$102.41; 34 gallons ethyl at 14c, \$4.76; total \$107.17." During the time the tenant purchased gasoline from the Midland Oil Co., Mr. Ottenhoff, president, called at least once a week; sometimes he inquired about gasoline and at other times he collected checks.

Mr. Ottenhoff testified in support of defendant's plea that at the time the gasoline was delivered defendant did not own any trucks or motor equipment for the delivery of gasoline but said that this gasoline was delivered to the customers of defendant under an oral contract between defendant and Wierenga Brothers Cartage Co.; that defendant paid the cartage company once each month for delivering the gas. He said that he never gave any orders to John Lananga and that the Midland Oil Co. did not give any orders to John Lananga, or pay him any salary. The office of the Midland Oil Co. was at 2205 West Harrison street, Chicago, in the office of the cartage company. The oral contract of the cartage company had been entered into about five years prior to the trial. Mr. Ottenhoff said that the custom was that when defendant had a customer for oil or gasoline, defendant notified the cartage company to make delivery, but that defendant never gave any instructions to the drivers; that these drivers took receipt blanks of the defendant company for all oil and gasoline delivered and redelivered them to the Midland Oil Co. He said "We (Midland Oil Co.) instructed Wierenga Brothers Cartage Company to get receipts for us, in fact we had receipts printed. These receipt blanks were used as invoices to our customers whereby Wierenga Brothers got the receipt for us."

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The Midland Oil Co. had one desk in the office of the cartage company but did not pay any rent for the space occupied. This desk was used by Mr. Ottenhoff, the president of defendant. The cartage company had three trucks on which the name of defendant company was inscribed, and these trucks seem to have been used exclusively for the delivery of products of defendant.

John Lananga testified that his salary was paid by the cartage company by checks; that his orders were given to him by the manager of the cartage company, Ben Wierenga, and Mr. Ottenhoff said that he gave orders to Wierenga, not to the driver. Defendant corporation has a capital stock of \$10,000, and of this stock Ben Wierenga owns \$2,000. Defendant offered no further proof as to the terms of the supposed oral agreement. There is no proof in the record of the amount paid to the cartage company by defendant company for delivery of gasoline to its customers, and while Mr. Ottenhoff's testimony is to the effect that defendant did not own the trucks, still it does not appear definitely who was in fact the owner. There is evidence tending to show that the cartage company did some business for other customers, and that it was engaged in business prior to the organization of the defendant company.

Section 2065 of Busch-Hornstein's Revised Chicago Code of 1931 provides:

"It shall be unlawful for any person, firm or corporation to use or to cause or permit any of his, their or its employee to use any motor vehicle, wagon or other vehicle in the transportation of property upon the streets, alleys or avenues of the city unless such motor vehicle, wagon or other vehicle shall have the name and addresses of the owner thereof, and also a serial number distinguishing said motor vehicle, wagon or other vehicle from any other vehicle controlled or used by the same person, firm or corporation, plainly painted, in letters at least one and one-half inches in length, in a conspicuous place on the outside of such vehicle; provided that any such person, firm or corporation using and operating in the city more than five such vehicles may cause such name and serial number to be painted on each vehicle as aforesaid in letters not less than three inches in length and omit therefrom the address of such person, firm or corporation; and provided, further, that in event such vehicle is used or operated continuously by a lessee or bailee or other person, firm or corporation having complete control

The National Oil Co. had one truck in the office of the
Chicago company but did not pay any rent for the space occupied.
This truck was used by Mr. Stenhouse, the president of defendant.
The Chicago company had three trucks on which the name of defendant
and company was inscribed, and these trucks seem to have been used
exclusively for the delivery of products of defendant.

John Stenhouse testified that his salary was paid by the
Chicago company by check; that his salary was given to him by
the manager of the Chicago company, Sam Stenhouse, and Mr. Stenhouse
said that he gave orders to Stenhouse, not to the driver. Defendant
corporation had a capital stock of \$25,000, and at this stock Sam
Stenhouse owned \$2,000. Defendant offered no further proof as to the
facts of the supposed oral agreement. There is no proof in the
record of the witness paid to the Chicago company by defendant company
for delivery of gasoline to its customers, and while Mr. Stenhouse's
testimony is to the effect that defendant did not own the trucks,
still it does not appear definitely who was in fact the owner.
There is evidence tending to show that the Chicago company did some
business for other customers, and that it was engaged in business
other than the transportation of the defendant company.

William Ross of Beach-Hornstein's, a licensed Chicago dealer in
1931 testified:

"I shall be unwilling for any person, firm or corporation
to use or to cause to be used any of their or its equipment to
use any motor vehicle, wagon or other vehicle in the transportation
of property upon the streets, alleys or avenues of the city of Chicago,
such motor vehicle, wagon or other vehicle shall have the name and
address of the owner thereof, and also a certain number displayed
on the side motor vehicle, wagon or other vehicle from any other
vehicle registered or used by the same person, firm or corporation,
being painted, in letters at least one and one-half inches in
length, in a conspicuous place on the exterior of such vehicle;
provided that not such person, firm or corporation using and operating
in the city of Chicago such vehicles may cause such name and
address to be painted on each vehicle as aforesaid in letters
not less than three inches in length and with letters the color
of such person, firm or corporation, and provided, further, that in
event such vehicle is used or operated continuously by a person or
person or other person, firm or corporation having complete control

of such vehicle, instead of the owner thereof, then the name, address and serial number or name and serial number, as the case may be, of such lessee, bailee or other person, firm or corporation may be painted on provided, that any such person, firm or corporation using and operating were the owner thereof. Such name, address and serial number, or name and serial number, as the case may be, shall be kept so painted, plainly and distinctly, at all times while such vehicle is in use on the streets, alleys or avenues of the city. This section, however, shall not be construed as applying to street cars running on metallic rails, or to any motor vehicle, wagon or other vehicle which is used solely and exclusively for pleasure."

The only name appearing on the truck which delivered this gas was that of defendant. If the cartage company owned the truck its name should have been on it.

Defendant insists that under this evidence a motion made by it at the close of all the evidence of an instructed verdict in its favor should have been given, and this seems to be the controlling question in the case. This contention is based upon the theory that under the undisputed facts the cartage company was an independent contractor and not the agent of defendant, and that Lananga, the driver, was not the agent or servant of defendant. In support of this contention, defendant cites Foster v. Sadsworth-Howland Co., 168 Ill. 514; Connolly v. Peoples Gas Light Co., 260 Ill. 162; Bensby v. Bartlett, 315 Ill. 616, with similar cases from other jurisdictions. On the other hand, it is contended by plaintiffs that the evidence on this point was sufficient to raise an issue of fact, which has been settled adversely to defendant's contention by the verdict of the jury, and they rely upon Page v. Brink's Chicago City Express Co., 192 Ill. App. 389; Kirn v. Chicago Journal Co., 195 Ill. App. 197; Hartley v. Red Ball Transit Co., 344 Ill. 534, with other cases as sustaining this contention. It is quite impossible to discuss in detail all the cases which have been called to our attention as bearing on this question. A review of them indicates that the reason that a master is held answerable for the wrongs of his servant has sometimes been put upon too narrow ground. The broad basis for the rule was well stated by Chief Justice Shaw in Farewell v. Boston & Worcester R.R.

of such vehicles, instead of the owner thereof, from the moment
the vehicle is used for such purposes, and the owner thereof
may be held liable, either as owner or as driver, for any
negligence or fault on the part of the driver, if the owner
has not taken proper care to select a competent driver, and
if the driver is not properly instructed, and if the owner
has not taken proper care to maintain the vehicle in good
condition, and if the owner has not taken proper care to
provide for the safety of the public, and if the owner has
not taken proper care to provide for the safety of the driver.

The only issue appearing on the record which relates to the
fact of defendant's liability is the issue of whether or not
the defendant was negligent.

Defendant insists that under this evidence a motion made
by it at the close of all the evidence of an instructed verdict is
the law should have been given, and this seems to be the controlling
question in the case. This contention is based upon the theory that

under the facts stated the entire company was an independent con-
tractor and not the agent of defendant, and that therefore, the driver
was not the agent or servant of defendant, in support of this con-

tention, defendant relies upon Smith v. Smith, 100 Cal. 100, 101.
This contention is based upon the fact that the driver was not
the agent or servant of defendant, and that therefore, the driver

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This contention is based upon the fact that the driver was not
the agent or servant of defendant, and that therefore, the driver

Corp., 4 Metcalf 49, quoted with approval in Standard Oil Co. v. Anderson, 212 ^{U.S.} 215, where it was pointed out that the master was not liable because of authority given to the servant nor because the servant had been negligent "But because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured." In other words, the rule is based on a "great principle of social duty," adopted "from general considerations of policy and security." In the light of that fundamental principle it is apparent that the rule announced in a number of the cases that the test of whether the person doing the master's work is a servant or agent of the master or an independent contractor depends as a matter of law upon the question of whether the employee may be discharged by the employer is only applicable in cases where the evidence on that point is uncontradicted, and there are no facts which would require the issue to be submitted to the jury. Thus in some of the cases it is said that where the contract between the employer and employee is in writing, it is for the court to determine as a matter of law whether the relation is that of employer and employee or of independent contractor.

The case of Shannon v. Nightingale, 321 Ill. 168, seems not unlike the instant case. It was charged there that a truck hauling oil and gasoline was negligently driven by one Pratt over plaintiff, who was thereby injured. It was not contended that the driver was not negligent, but the defense relied on was that Pratt "was not their (defendants, who were partners of the Eastern Illinois Oil Co.) servant but was the servant of an independent contractor," one Rose Loux. The evidence tended to show that Pratt, who drove the truck, received payment from customers of defendants and took orders for further deliveries to them; that

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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the name of the firm, "Eastern Illinois Oil Co.," was painted on the truck and printed on the memorandum tickets given when orders were delivered or taken; that the trucks, however, belonged to Mrs. Loux, and were kept on her premises, and that Pratt and other drivers of the trucks were employed by her. The court said:

"The name 'Eastern Illinois Oil Company' was printed on all the trucks, and the drivers of them, on delivering gasoline or oil, left a memorandum ticket containing the same name. They also took orders for gasoline and oil, using memorandum tickets bearing the same name. Orders were also taken by Mrs. Loux and telephoned to the office of the plaintiffs in error (defendants), and, together with orders received directly from customers personally by telephone to the plaintiffs in error's office, were placed on a hook in the office and executed by the truck drivers. The agreement between Mrs. Loux and the Eastern Illinois Oil Company was that she would furnish trucks and drivers to deliver gasoline, kerosene, lubricating oil, or anything the Eastern Illinois Oil Company had for sale, and the drivers made delivery of the goods ordered and collections of the price. Under the contract the plaintiffs in error furnished the gasoline to run the trucks, Mrs. Loux furnished the oil, and the cost of repairs and other expenses of operation of the trucks were paid by her. The men were paid weekly, at the request of Mrs. Loux, by checks of the Eastern Illinois Oil Company. These payments were charged against Mrs. Loux's account and monthly settlements were made with her by the plaintiffs in error, in which she was credited with the amount of the gasoline and kerosene delivered and was paid the balance remaining after the deductions for salaries were made. The plaintiffs in error had no control over the men employed by Mrs. Loux and no authority to discharge the drivers but did have authority to direct the drivers in regard to the deliveries to be made. The agreement between the plaintiffs in error and Mrs. Loux was that her servants were to call at the station, receive orders, go and fill them, collect the money and bring it in, and she told them, in substance, to do whatever the plaintiffs in error directed them to do in the delivery of oil and gasoline."

Upon this evidence the Supreme court held that no question of law arose for their consideration except that raised by the motion to direct the verdict, and that the plea that Pratt was not the servant of defendants "raised an issue of fact;" that the jury had found against defendants on that issue and that under such a state of facts (even though there was no conflict in the testimony, or the testimony might be agreed upon and stipulated) controverted questions of fact were involved. The opinion goes on to state that if the contract with Mrs. Loux had been in writing the question would have become a matter of law, citing Pioneer Construction Co. v. Hansen.

176 Ill. 100; that since the contract was not in writing but could be shown only by parcel evidence, the determination of its terms was necessarily left to the jury, and that it was properly submitted to the jury under instructions by the court. The court in that opinion also distinguished Hensby v. Bartlett, 318 Ill. 616 (on which defendant here relies) and said that it was not intended in that case "to overthrow the rule announced in the decisions which have been cited, that the verdict of the jury on such mixed questions of law and fact, approved by the trial court and the appellate court, is conclusive and not subject to review by this court."

In the yet later case of Bartley v. Red Ball Transit Co., 344 Ill. 534, plaintiff sued defendant for alleged negligence of its alleged servant, Thomas Burke, in driving a truck, whereby plaintiff was injured. The defense relied on was that Burke was not the servant or employee of defendant but an independent contractor. Defendant introduced in evidence a written contract between itself and Burke, which showed the sale to Burke of a Red Ball motor truck and an agreement to give him work to consist of long distance hauling. The written contract expressly provided that Burke was not an employee of the company, nor in any way or at any time its agent, he being in handling all the shipments an individual contractor and to be considered and treated as such. The contract, however, provided that the truckman should make all collections as directed by the company and turn same in at the first company office he passed and report to all Red Ball offices located in cities through which he was passing, and that he should follow instructions given him by the managers. The court held:

"If the construction of the contract depends not only upon the meaning of the words employed but upon extrinsic facts and circumstances or upon the construction which the parties themselves have placed upon it, which is to be proved like any other fact if such facts are controverted, the inference to be drawn is for the jury, and in such case the whole question as to

what the contract was should be submitted to the jury under proper instructions. Turner v. Ogden Art Celerotype Co., 225 Ill. 629."

We think the rule announced in these cases is controlling here. It is admitted that the fact that defendant's name was on the truck in several places made a prima facie case, indicating that it was being used in defendant's business. Indeed, the ordinance of the city of Chicago quoted above required owners to use such designations in order to distinguish their trucks. In addition to these facts, which were sufficient to make a prima facie case, there is the further evidence showing that the drivers of the truck delivered bills to the customers and took orders while on their trips in defendant's behalf. There is the further important fact that the burden of proof was upon defendant to sustain its plea. There were circumstances throwing doubt upon the facts to which the president of the company testified. The jury could reasonably find that some testimony offered by defendant was fictitious. The evidence as to the terms of the supposed contract was indefinite and uncertain. The testimony of the president to the effect that he never gave directions to the driver is under all the facts which appear in the record quite improbable. The jury apparently did not believe some of the testimony produced by defendant and we cannot say that they were unreasonable in so doing. The jury having settled this controlling issue of fact in plaintiffs' favor, we hold that the judgment should be affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

McCurry, J., dissenting: I think the verdict is manifestly against the weight of the evidence and that the judgment should be reversed and the cause remanded.

37643

JOHN R. MAUFF,
Appellee,

vs.

ARTHUR W. CUTTEN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 628¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon an implied contract to pay for personal services and upon trial by jury there was a verdict for plaintiff in the sum of \$10,000, upon which judgment was entered March 17, 1934.

The declaration contained the common counts, to which was attached a verified statement disclosing the particular services said to have been rendered. Defendant filed a plea of the general issue, to which was attached an affidavit of merits, setting up the nature of his defense, which was in substance that the alleged services were not for the sole benefit of defendants, but, on the contrary were for the joint benefit of plaintiff and defendant upon matters in which they were jointly and mutually interested.

However, defendant says that the issue of the implied employment having been submitted to the jury and the verdict in favor of plaintiff rendered on that issue, he accepts the verdict as a finding against him on the question of employment, which he does not ask this court to review.

The argument of defendant is therefore directed solely to the point that the damages allowed were excessive. He argues that expert testimony is necessary in order to establish the amount of compensation which ought to be allowed, because it is the best evidence which in the nature of the case could be obtained. The only expert evidence offered by plaintiff was his own testimony as to the value of his services in his opinion. The evidence was upon objection by defendant excluded. Defendant also says that evidence

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For the purpose of this study, the data were collected from the following sources:

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps us to understand the world we live in today.

as to immediate and remote benefits derived by defendant from plaintiff's supposed services was immaterial, and that the real question is, What was the general worth of the services rendered by plaintiff to defendant?

Plaintiff, on the other hand, contends that expert evidence was unnecessary to support the verdict, but if it was, his own opinion as to the value of his services was improperly excluded, and that defendant is now estopped to contend that such evidence is necessary, it having been excluded upon his objection. Plaintiff further contends that such expert evidence is only advisory and may be properly disregarded by either court or jury; that it was necessary for plaintiff ^{only} to produce the best evidence available and that the importance of plaintiff's services to defendant is an element of their value. Plaintiff also says that the verdict was not excessive, as a matter of law; that the expert evidence of defendant was entirely worthless, and at any rate, the weight of it was for the jury. He says that this appeal was prosecuted for delay and asks that statutory damages be assessed.

These contentions require a summary of the material facts.

The alleged employment of plaintiff by defendant began in 1920 and continued until March, 1933. Plaintiff and defendant had known each other for thirty years prior to the beginning of these transactions and had been very close friends; as plaintiff says (and defendant does not deny) they were like "Damon and Pythias." Both were engaged in business in connection with the Board of Trade of Chicago. Plaintiff joined the Board of Trade in 1896 and sold his membership in 1933; he operated very actively from 1896 until the year before the war, 1913; before prohibition he was a buyer of barley on the exchange floor for certain brewers and malsters and bought and sold other cash grain; he was also connected with the elevator corporation which had elevators in South Chicago and there

participated in a general grain business.

In 1915 plaintiff was elected a director of the Chicago Board of Trade and served for three years; in 1916, second vice-president; in 1917 first vice-president (acting part time as president), and also from 1917 secretary (which was an all time job) until 1923, when he was appointed executive vice-president, which he says was a new office giving him greater power than he possessed as secretary. In 1917 he was president of the Council of Grain Exchanges, an association of all the grain exchanges in the United States. He had not been officially connected with the Board of Trade since 1933, when he retired.

Defendant was a large operator; his business was that of a speculator; he dealt for the most part in grains and at times carried speculative commitments of 30,000,000 bushels of grain, where a fluctuation of one cent in the market price meant a gain or loss of \$300,000; he usually took what in the Board of Trade vernacular was known as "the long side of the market"; in other words, he was known as a "bull." He was of the opinion that the rules of the Board of Trade were unfairly drawn, so as to favor those traders who took the "short side of the market"; that is, the "bears."

Urged by agricultural interests, Congress had made the operation of traders on boards subject to investigation. Legislation which gave the Secretary of Agriculture power to adopt rules for the regulation of abuses growing out of speculation, was enacted. Plaintiff through experience heretofore related was a recognized authority upon subjects connected with the Board of Trade; he had acted as its spokesman and was accustomed to make speeches on subjects connected with its business; he was familiar with its laws and practices and court decisions with reference thereto, as well as economic principles underlying business carried on through its agency.

At the time of the alleged employment by Defendant in June,

continued in a number of other ways.

In 1912 himself was elected a director of the Chicago Board of Trade and served for three years; in 1916, second vice president; in 1917 first vice-president (acting part time as president), and also from 1917 secretary (which was on all time job) until 1921, when he was appointed executive vice-president, which he was a new office giving him greater power than he possessed as secretary. In 1917 he was president of the Cattle Raisers' Association, an organization of all the grain traders in the United States. He had not been officially connected with the Board of Trade since 1921, when he retired.

Defendant was a large operator; his business was that of a speculator; he dealt for the most part in grain and at times oil and securities. He was a member of the Board of Trade, where a fluctuation of one cent in the market price meant a gain or loss of \$500,000; he usually took his seat at the far end of the floor as "the long side of the market"; in other words, he was known as a "bull". He was of the opinion that the rules of the Board of Trade were not fair to him, as he felt that traders who took the "short side of the market", that is, the "bear",

urged by national interest, Congress had made the operation of traders on boards subject to investigation. Indeed, this was the necessity of defendant's power to manipulate the market, the regulation of which was not at all desirable, was needed. Plaintiff through experience believed that a new organization was necessary to protect himself and the Board of Trade; he had acted as its secretary and was anxious to have operation on subjects connected with its business; he was familiar with its laws and practices and could deal with reference thereto, as well as economic principles underlying business carried on through its agency. At the time of the witness' deposition in 1921,

1929, plaintiff was in the service of E. Lowitz & Co., a brokerage house in Chicago, which dealt on the Board of Trade. He was a solicitor, as the trade said, "a customer's man." At the beginning of his employment he received a salary of \$30,000 a year, and when he applied for the position with E. Lowitz & Co. he expressed the opinion that he could swing more of defendant's business to that firm. Plaintiff received salary in his usual employment during two of the four years for which he now claims compensation from defendant. When his employment with Lowitz & Co. ceased, plaintiff applied for a position with E. A. Pierce & Co., and, the evidence shows, made an affidavit that he had no other business connections for which he received compensation.

In 1927 plaintiff was employed by defendant to bring about certain reforms in the elevator practices connected with the grain trade. Plaintiff's testimony is to the effect that defendant paid him \$20,000 for services rendered in connection with that employment but defendant says that payment of \$25,000 was in fact made. Later plaintiff was employed by the Farmers National Grain Corporation for about two weeks in connection with matters at Washington and in Chicago, and for this service he was paid \$2000.

Beginning June, 1929, and up to April, 1933, all defendant's personal letters concerning Board of Trade subjects and all propaganda emanating from defendant, with the exception of a series of articles in the Saturday Evening Post prepared by Mr. Sparkes, were prepared by plaintiff. To what extent defendant consulted with plaintiff concerning these articles is controverted. The term "ghost writer" is used and seems to express well the nature of the services performed by plaintiff for defendant during the term of his employment. He made a trip to Washington and interviewed the Secretary of Agriculture and some U. S. Senators for the purpose of securing their cooperation in bringing about reforms defendant

1937, Plaintiff was in the service of E. Louis & Co., a brokerage
house in Chicago, which house on the board of Trade. He was a no-
factor, as the facts said, "a customer's name." At the beginning
of his employment he received a salary of \$40,000 a year, and when
he applied for the position with E. Louis & Co. he expressed the
opinion that he would bring some of defendant's business to that
firm. Plaintiff received salary in his usual employment during two
of the four years the while he was doing considerable work for
him. From his employment with E. Louis & Co. Plaintiff was
discharged a position with E. A. Carter & Co., and the witness
knows, made an affidavit that he had no other business connections
that which he received compensation.
In 1937 Plaintiff was employed by defendant to bring about
certain matters in the Chicago business connected with the grain
trade. Plaintiff's testimony is to the effect that defendant paid
him \$25,000 for services rendered in connection with that employment,
but defendant says that payment of \$25,000 was in fact made, and
that said sum was employed by the Eastern National Grain Corpora-
tion for about two weeks in connection with matters of business
and in Chicago, and the witness as was said above,
beginning about 1937, and up to April, 1938, all defendant's
business affairs connected with the witness and all other
business connected with defendant, with the exception of a series of
affairs in the Chicago business that occurred in the summer, 1937,
Plaintiff's testimony to what would be defendant's business and
Plaintiff's testimony that business is connected. The sum
of \$25,000 was paid and money in Chicago with the name of the
business rendered by Plaintiff for defendant during the term of
his employment. He was a full business and financial in-
strument in defendant and was E. A. Carter for the purpose of
rendering their employment in Chicago about before defendant

desired to have adopted. He, himself, bore the entire expense of this trip to Washington. To the same end, he wrote for defendant an article printed in the publication "The Business Week," under date of September 17, 1930; June 7, 1930, he prepared a letter for defendant in reply to one received from Mr. Hoyt, chairman of the Grain Committee of the Board of Trade, with reference to a proposed rule to limit carload deliveries on contracts to the last three days of the month. In January, 1931, he wrote an article against a proposed rule which would have permitted an inferior grade of wheat on the Board of Trade for future contracts. The argument as prepared was given to defendant, who had it published in the Chicago press. In 1931, plaintiff also wrote for defendant's use a statement of rules of the practices of the Board which were objectionable to defendant. In 1932 he prepared data and information on the subject of farm relief sent under defendant's name to Senator Searby of Iowa, who was then a candidate for election to the U. S. senate.

December 30, 1932, plaintiff prepared an article for the Associated Press expressing defendant's views on the subject of grain markets. It was intended to be used in the New Year day edition of the newspapers, and it was so published under defendant's signature. On January 3, 1933, plaintiff prepared a reply to certain supposed "radical" views expressed in a journal published at Lincoln, Neb. under date of December 28, 1932. In 1932 he prepared sixteen articles dealing with various phases of the subjects in which defendant was particularly interested, some of which were broadcasted.

In 1932 Hayden Sparkes wrote for the Saturday Evening Post an article entitled "The Speculator." It appeared as a serial in four issues and was in general a biography of defendant, including his views as to needed reforms on the Board of Trade. Plaintiff consulted with defendant as to views he wished presented in these articles and read the articles prior to their publication. As to

his actual influence upon the contents of this series of articles, the evidence is in conflict.

1932

In ~~XXXX~~ plaintiff wrote an article for publication in the Canadian press defending the policy of Premier Bennett of Canada in controlling the Canadian Wheat market in the interest of the farmers; it was published under defendant's signature; he also wrote an article called "The Vindicated Speculator," which appeared in the Chicago Journal of Commerce December 19, 1932; February, 1933, he prepared a letter which defendant signed and sent to President Roosevelt, the purpose being to interest the President in defendant's views concerning the Chicago grain market. A letter of similar design was prepared in March to be sent by defendant over his signature to the President, which was afterward printed in pamphlet form; it was first sent to the Secretary of the President, who suggested certain changes before its delivery to the President; plaintiff thereupon rewrote the article and delivered it to defendant, who signed it and sent it to the President.

Plaintiff's statement of claim averred (and the statement is not denied in the affidavit of merits) that defendant has a complete file of letters, newspapers and magazine articles which plaintiff wrote for defendant and which appeared over the signature of defendant from time to time in various newspapers and magazines; many of these it is averred were dictated by plaintiff to defendant's secretary, and copies were not retained by plaintiff although they were retained by defendant or his secretary. The letters show correspondence with several U. S. senators, and plaintiff testifies to repeated consultations with them in Chicago concerning these particular matters in which defendant had a financial interest.

Defendant says that the issue on the question of damages is, What was the reasonable compensation for these services? He cites Lockwood v. Union, 56 Ill. 506, a case while quite unlike this one

upon the facts state the general rule that a person rendering service upon an implied contract is entitled to reasonable compensation. That rule is not questioned.

As already stated, defendant argues that expert evidence is necessary as the best evidence of which the nature of the case permits. He cites Yarber v. Chicago & Alton Ry. Co., 238 Ill. 589; Lyons v. Chicago City Ry. Co., 253 Ill. 75. He contends that the proper way to arrive at reasonable compensation would be to take each particular service alleged to have been performed and prove by some one familiar with the value and character of such service the reasonable value thereof. Defendant tried the case on that theory and offered such evidence, which was received and permitted to go to the jury. Plaintiff, who was presumably quite familiar with the value of the services, was asked for his opinion, but defendant objected and the evidence was excluded. Having secured the rejection of this kind of evidence then offered in behalf of plaintiff, defendant is now estopped to contend that the evidence excluded upon his objection was necessary. Davis v. Wakelae, 156 U. S. 686.

Moreover, we think that without any opinion evidence, there were facts in this case from which the jury might draw the necessary inferences as to the value of the services performed. In two cases in their nature quite different from this one, except as to the question of damages, our Supreme court held that exact proof of the value not being obtainable, the jury might draw inferences from the facts in evidence tending to establish such value. Becker v. Steel Co., 84 Ill. 378; Gorham v. Iron Co. 234 Ill. 594. It is quite unnecessary, we think, to dilate upon the unreliable and unsatisfactory character of expert evidence. The courts of this state have refused to be bound by it on the questions involving the reasonable value of attorney's fees for services. Lee v. Leary.

upon the facts stated the court held that a person testifying under
 this rule is not disqualified.
 The court stated, although it is true that expert evidence is
 necessary in the best evidence of value the nature of the case pre-
 sents. See also Yarber v. Yarber & Allen, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

219 Ill. 216. The general rule is well stated in 28 Corpus Juris 728, as follows:

"The weight to be given to opinion evidence in any case, whether the statement is of the inference or conclusion of an observer or the judgment of an expert, is, within the bounds of reason, entirely a question for the determination of the jury or of the court, when trying a question of fact, taking into consideration the intelligence, learning and experience of the witness, and the degree of attention which he gave to the matter. The judgment of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it or by the court trying an issue of fact, unless the subject is one for experts or skilled witnesses alone, and the jury cannot properly be assumed to have, or be able to form, correct opinions of their own, under which circumstances the unanimous evidence of properly qualified witnesses has been regarded by some courts as conclusive."

The expert evidence offered by defendant in this case was received, and defendant argues therefrom that the value of the services performed by plaintiff for defendant did not exceed \$2500. Plaintiff's own evidence was excluded upon defendant's objection, and the ruling of the court in this respect was, we think, erroneous. 1 Wigmore on Evidence, sec. 715, p. 1135, the author says:

"Where the testimony is directed not so much to a class of services as to those of a particular person in view of his individual qualities, the testimony of a person who had employed that individual might be receivable, even though he had no general knowledge of such services as a class. It would be a hard rule which would prevent a plaintiff from informing the jury of his own estimate of the value of his services; and the Courts seem inclined to impose no terms as to his general familiarity with the class of services; that he has rendered them justifies listening to his opinion."

Plaintiff's verified affidavit of claim is to the effect that his services were worth \$50,000. He may assume he would have so testified if he had been permitted.

Defendant presumably was a competent witness as to the worth and value of plaintiff's services to him, but was not asked by his counsel to testify on that subject. The jury had a right to take that fact into consideration. The services here rendered were unique in their character, and the case disclosed by the facts is not one where the services were such as might be supplied by a class of experts, such as physicians, attorneys, engineers, etc.

It is certainly the rule in tort cases that the difficulty of proving the amount of damages does not render recovery impossible. A person who has violated his contract will not be permitted to escape liability because of the lack of a perfect measure whereby the damages caused by his breach may be determined. Hotter Oil Corp. v. Carpenter, 34 Fed. (2d) 539.

Defendant concedes that the evidence in this record justified a verdict of not more than \$2500. That contention is based upon the opinion of expert witnesses produced by him. As already stated, the expert testimony for plaintiff upon defendant's objection was excluded. It is apparent that the jury rejected (and it had a right to reject) the evidence offered by defendant's experts. That was not the only evidence, however, in the record from which inferences might be drawn as to the value of plaintiff's services. There was evidence of compensation paid to plaintiff by defendant for similar services. There was the evidence as to payments made by the Farmers National Grain Corporation to plaintiff for similar services. There was the evidence as to compensation plaintiff received from former employers. There was also evidence as to the high confidence reposed in plaintiff by defendant and the further fact that defendant while competent to testify to the amount of compensation which would be reasonable, failed to do so. We doubt very much whether any further number of experts might have given evidence more satisfactory to the jury. The whole issue resolves itself into an issue of fact. There was evidence from which the jury might draw inferences and from which it found the reasonable compensation for the services rendered was the amount of the judgment entered. The facts were for the jury. The court, who saw and heard the witnesses was approved. We do not find facts in the record which would justify an Appellate court in finding that the verdict is manifestly against the evidence.

For these reasons the judgment is affirmed.

AFFIRMED.

McSurely, J., concurs.

O'Connor, P. J., I dissent. Langley & Co., Inc. v. Kasey, Stewart & Co., App. Ct. First Dist. No. 37360 (not reported)

It is certainly the rule in every case that the identity of the person who has violated his contract will not be permitted to be a defense against the recovery of the price of a contract made with him. The rule is the same in every case.

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It had a right to reject the evidence offered by defendant in the objection was sustained. It is assumed that the jury rejected the evidence offered by defendant for plaintiff's own testimony. It is assumed that the jury rejected the evidence offered by defendant for plaintiff's own testimony. It is assumed that the jury rejected the evidence offered by defendant for plaintiff's own testimony.

[illegible][illegible]

1944-1945. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished for your information.

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37687

MALCOLM C. MOST,
Appellee,

vs.

CASE-MOODY PIE CORPORATION,
a Corporation, and FRANK DILLON,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

279 I.A. 628²

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for malicious prosecution defendants filed pleas of the general issue and justification. The cause was tried by a jury which returned a verdict for plaintiff in the sum of \$2750, on which the court, overruling motions for a new trial and in arrest, entered judgment which defendants ask us to reverse.

The declaration was in three counts. The first alleged that on July 13, 1931, defendants appeared before Judge Samuel Trade of the Municipal court and "falsely and maliciously and without reasonable or probable cause" charged plaintiff with having stolen thirty pies of the value of \$15, - the property of defendant Case-Moody Pie Corporation; that afterward by themselves, their agents and servants, they "falsely and maliciously and without reasonable or probable cause," induced the Judge to issue a warrant for the apprehension of plaintiff to answer for the crime of larceny, and that under the warrant on July 15th, without reasonable or probable cause, they wrongfully and unjustly caused plaintiff to be arrested and imprisoned for twelve hours; that on July 21st they falsely, maliciously and without reasonable or probable cause caused plaintiff to be carried into custody before the court and tried, upon which trial plaintiff was found not guilty; that by means thereof his reputation and credit were injured.

The second count averred that on July 13, 1931, defendants falsely and maliciously without probable cause charged plaintiff

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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OBTAINED TO DATE

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FROM THE BUREAU OF CHEMICAL TECHNOLOGY

trial was in arrest, ordered for want of evidence and as to
one of \$2500, on which the court, overruling motions for a new
verdict by a jury which returned a verdict for plaintiff in the
sum of \$1000, and the court found for defendant. The court
in an action on the note for medical expenses for \$1000.

On July 12, 1931, defendant appeared before Judge Samuel Smith at the District Court and voluntarily and intelligently entered a plea of guilty to the charge of kidnapping. The court then sentenced defendant to the State Prison for a term of five years and six months. Defendant was committed to the custody of the Warden of the State Prison, and the court adjourned.

with the crime of larceny and caused him to be arrested and put in prison for twelve hours; that on August 25th he was discharged and acquitted; that he has been greatly injured in his credit and reputation and brought into scandal, infamy and disgrace and suffered great anxiety, has been obliged to lay out and expend money in large sums in procuring discharge and defending himself.

The third count charged assault and battery, but no evidence was submitted under it.

Of the many errors alleged, it will be necessary to consider only one, namely, that the verdict on which judgment was entered was against the manifest weight of the evidence.

The Case-Keedy Pie Corporation is engaged in the business of manufacturing baker products. At the time of the occurrences here in question its place of business was at Wood and Walnut streets in Chicago. Defendant Dillon was its sales manager. Plaintiff was one of several salesmen who rendered similar service. He drove a pie truck daily over a route in and around the stockyard district of Chicago, starting at 41st street and South Ashland avenue; he was paid a salary and commission and procured his own customers. He had been employed by the corporation for about a year but had also worked for its predecessor, so that he had been in the same line of business for about nine years; he was 35 years old, married and lived with his family. He drove the truck, which he says was built like a patrol wagon; the entrance was at the rear; on the sides within were the pie racks; in front of the back entrance were doors which were usually locked; within on the racks were receptacles for the pies, which were called "cells."

In the usual course of business the driver, the day before taking out goods, would give a written order specifying the particular goods desired, which order would be hung up on the rack in the office of the corporation or "settlement room," where all the

with the office of the company and advised him to be satisfied and not to
return for further business; that on August 19th he was dissatisfied and
advised; that on the same day he was dissatisfied in his quality and
return; that on August 19th he was dissatisfied, advised and returned
great anxiety, has been obliged to lay out and return money in

large sums in providing insurance and attending himself.
The thing would be changed and he would, but he was
there was no objection to it.

If the money were allowed, it will be necessary to con-
sider with him, namely, that the money was given to him
entirely was against the wishes of the company.

The case is the case of the company in the business
of manufacturing paper products. At the time of the business
here in question its share of business was of the order of
about 10 percent. The company is the same company.

Plaintiff was one of several witnesses who rendered similar service.
He gave a list of names over a period of time and during the period
of time of the company, which is the same and the same.

He was paid a salary and commission and received his own
equipment. He had been employed by the company for about a
year but had also worked for the company, as that he had been
in the same line of business for about nine years; he was 35 years
old, married and lived with his family. He gave the names, which
he gave the list of names, the names of the

that, as the names which were the list of names; in front of the
names were names which were usually found; which in the same
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the office of the company at "Central Bank," which was the

drivers checked in. Each driver signed his own order; the goods were thereafter put into his truck by loaders, of whom at this time Nicholas Barniecki was foreman. It was the custom of the drivers to start their trucks usually about five o'clock each morning. The written order of each driver would be hung up on the rear of his truck. Upon completing the journey each day the driver would return the truck to the factory, turn in the money he had collected at the settlement room and make out a similar written order for the following day.

July 13, 1931, defendant Dillen filed an information in the Municipal court charging that on July 10, 1931, plaintiff stole 30 pies of the value of \$15 - property of the corporation. Judge Trade endorsed the information, certifying he had examined it and "heard evidence thereon" and was satisfied that there was probable cause for filing it. He ordered that a capias issue, fixing bond for \$500 or a cash deposit of \$100. The capias issued July 13th and was returned served July 31st. Plaintiff, who was discharged from its service by the corporation July 9th, first heard the warrant was out against him about July 20th and went to the police station, taking his real estate tax bill with him, apparently with the idea that he could sign his own bond. The lieutenant told him he must go to jail until he produced a bond. He was locked up in a cell. After two hours his father signed a bond and he was released. He had never before nor has he since been in prison. He employed an attorney to defend him, to whom he paid \$300 for services rendered. He was arraigned and entered a plea of not guilty. Trial by jury was waived, and the court found plaintiff not guilty and entered judgment in his favor and he was discharged August 25, 1931. This suit was begun February 23, 1932. The declaration was filed one month later.

In Glenn v. Lawrence, 280 Ill. 581, the Supreme court,

driver named in. Jack Brown signed his own name; the name
were therefore put into his hands by mistake, at which time
Michaela witnesses was taken. It was not known if the driver
to which name he usually gives a name each morning.
The witness order of each driver would be kept at the rear of
his truck. When completing the journey with the driver would
return the truck to the factory, turn in the money as had indicated
at the settlement room and make out a similar witness order for
the following day.

July 12, 1941, defendant called him an information in the
Michigan Motor Vehicle Code as July 17, 1935, Michigan Code
No. 10 of the Code of 1935 - Chapter of the Motor Vehicle Code.
Thereafter the information, verifying as had examined it and
"found evidence therein" was not satisfied that there was probable
cause for filing it. He ordered that a search be made, filing being
for 1935 at a cash deposit of \$100. The cash was paid July 1935
and was returned seven days later. Defendant, who was disappointed
from the service by the corporation July 1935, filed a suit and
warrant was not against him about July 1935 and went to the police
station, feeling his next contact was with him, necessarily with
the idea that he would sign his own bond. The defendant told him
he must go to jail until he produced a bond. He was locked up in a
cell. After two hours his father signed a bond and he was released.
He had never before and has he since been in prison. He worked as
assistant to defendant, in which he paid \$100 for services rendered.
He was arrested and charged a fine of not guilty. Taken by Mary
and father, and the court found defendant not guilty and released
defendant in his favor and he was discharged. August 22, 1941. This
suit was paid February 22, 1942. The defendant was filed and

through Mr. Justice Cartwright, summed up the law on the subject of malicious prosecution as follows:

"The facts which will sustain an action for malicious prosecution are (1) the commencement or continuance of an original, criminal or civil judicial proceeding; (2) its legal cessation by the present defendant against plaintiff, who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to the plaintiff. (26 Cyc. 3.)"

In this proceeding a criminal proceeding was begun against plaintiff at the instigation of defendants. It has terminated after a trial in the Municipal court in favor of plaintiff. The questions therefore, open for our consideration, are whether plaintiff established by a preponderance of the evidence the absence of probable cause, the presence of malice, and damages to the amount for which judgment was entered.

We have already recited the evidence bearing on the question of damages. It is apparent that the allowance made against defendants by the jury was punitive in its nature, rather than compensatory for actual damage sustained. In the absence of proof of malice, plaintiff would not be entitled to punitive damages but only to compensatory damages. Hanneman v. Minneapolis, S.F. & St. P. Ry. Co., 245 Ill. App. 196. The case therefore narrows itself down to a consideration of the question of whether from a preponderance of the evidence malice and want of probable cause may be regarded as established. We are not unmindful of the proposition of law (on which plaintiff relies and which is unquestioned) that while malice will not be inferred where probable cause exists, on the contrary, where there is an entire lack of probable cause, malice may be presumed to have been the motive actuating the prosecution. Roy v. Springs, 112 Ill. 656; Treptow v. Montgomery Ward & Co., 153 Ill. App. 422; Grise v. Pevely Dairy Co., 275 Ill. App. 231.

Plaintiff contends that there was an entire want of probable

cause, and this contention requires an examination of the evidence. As already stated, plaintiff was discharged July 9th and then accused of larceny. There is no evidence of express malice on the part of defendants who instigated this prosecution. There had been, so far as the evidence discloses, no prior controversy between any of them. There is nothing to indicate ill will or any motive to injure plaintiff on the part of the pie corporation, or any of its officers or employees. The theory that proof of malice is established seems to be based entirely upon the proposition that the arrest was made without any probable cause. The evidence bearing on that point has been given careful consideration.

We have already described the relationship of plaintiff to defendant corporation and the customary manner in which his services were performed. Dillon was sales manager of the corporation. Nicholas Barniecke was foreman of the loaders, whose duty it was to see that no one "gets away with anything." At the time of the trial he was only a loader. Mr. Henderson was the superintendent of the defendant corporation. Sidney Pellar ~~was president~~, Stanley Case ~~vice president~~, ^{were officers} A. R. Noelte bookkeeper in charge of the files and records. Ed Skonieczny and Charles Richmond were two of the drivers of trucks, while Harry Knowles, also known as Homer Mundy, and John Zack were of those employed as loaders.

July 8th in the afternoon plaintiff left his usual written order for pies to be filled that evening. It was made out on a printed form furnished by the pie corporation. In the morning about five o'clock he came for his truck, and he says that when he came he closed and locked the cell doors and back doors of the truck, signed his loading ticket and took it to the ticket office. He did not check his load. He says, "That was left up to us." He got in the truck and drove from the platform to the main part of the garage; he says he got off the truck and was looking for his

hand boxes; that Nicholas Bernicke, the foreman, called to him and asked him to back up to the platform. The foreman told plaintiff that he wanted to re-check his load. Plaintiff says he replied, "O. K., I don't even know what is in there myself." The foreman checked the pies in the presence of plaintiff and found 30 extra pies which were not on his order sheet. Plaintiff says he thinks the pies were worth from \$3.50 to \$4; he also says the foreman with his own hand wrote a charge for those extra pies on his loading ticket. Defendants were asked on the trial to produce the ticket, but it seems the original sheet had been destroyed after the trial of the criminal charge and before this suit was started.

The foreman testified he had checked the pies before plaintiff arrived and had talked by 'phone with Henderson, the superintendent, about the situation and Henderson told him to let plaintiff go ahead. He permitted plaintiff to proceed, and plaintiff says that day he sold all the pies and upon his return in the afternoon accounted for them at the office.

Plaintiff was called to the office, where he had a talk with Mr. Pellar, in the presence of Mr. Billon. Plaintiff says:

"Told Pellar that I was sorry he took that attitude, that I was afraid he was making a mistake-- he said he would have to leave me go for being dishonest with the company. That was all he said -- for being dishonest -- that was all he said. He didn't amplify that any, or explain, and I have told all that was said at that time."

Plaintiff went back to the office of the company on July 11th and saw the office manager and asked for his check; it was not ready. On the 14th or 15th he again returned and saw Billon. He went to the office of Mr. Cass. Henderson was there. Plaintiff testifies:

"Henderson, the head baker, said, 'I am surprised at you, East.' I said, 'You don't have to be surprised at me at all. I am old enough to take care of myself; don't go firing any bullets at me. Furthermore you were not even around and you don't know anything about the case.' Cass was not in his office. Billon told me I was crooked; that I had my chance there, and that they were going to take care of me from then on. I said, 'Well, I will go

right along with you.' There may have been a few other words said-- I don't recall. Have told all he said about my being cracked that I recall.

He told me I was getting away with a lot of things there and that it had been going on for some time and I told him, 'Well, you and I didn't stand no good; I suppose you saw your chance to get rid of me.' He said, 'That is a pretty good excuse but we caught you.'

Plaintiff testifies positively that he did not compare the loading ticket with the pie in the wagon on the morning in question.

Skonieczny corroborates him, saying that on this particular morning his own truck was right next to that of plaintiff. He says he checked his own wagon and then called to plaintiff, "Ain't you going to check your wagon?" and plaintiff said, "No, I'm too tired." This witness was one of the employees discharged by the corporation at this time.

Barniecke, the foreman, says he saw plaintiff enter the factory on the morning in question. The witness had unhooked the load of plaintiff prior to that time. He also called up Superintendent Henderson. He saw plaintiff get in the truck and while in it, open up some of the compartments, but does not know whether he opened up all of them. He says he turned the loading sheet into the office, but the witness is positive that he did not enter the extra pie upon the sheet. He says he did not write anything on it but made a memorandum and turned it into the office. Plaintiff was present when the foreman checked the pies and then told him to go on out with his load. At this time plaintiff simply remarked that somebody was trying to play him a dirty trick.

Reedmond, also a salesman of defendant company, testifies that on the afternoon of July 26th he met plaintiff at the corner of Lake and Wood streets; that plaintiff asked him if he had been fired, too. Witness said, "No." Plaintiff suggested that they see Mundy. They went to see Mundy and plaintiff told him that "they had caught them and that Mundy should go in there and say that the pies were just put in there that one day." This witness also said that about a month before plaintiff told him he wished he had a few extra pies

[illegible]

to make up his shortage, also that after July 9th plaintiff told him there was a subpoena out for the witness and that he, witness, should get out of town. Richmond was discharged by the company but had been re-employed at the time of the trial. On cross examination he said that three or four times a few pies were put in that weren't charged to the drivers; that he split two or three dollars with Mundy.

Mundy, alias Knowles, testifies that in June, by mistake, he put too many pies into plaintiff's truck and was going to take them out, but that plaintiff told him to leave them in, which he did, and he (plaintiff) would give him half the value of them; that is the way it would go on from day to day, and that he got money from plaintiff every morning when he came to work; that he received about two dollars from plaintiff outside the plant on the morning of July 9th in the presence of John Crak. He says that later in the day plaintiff told him they were caught and said that he (Mundy) was the only one who didn't have a chance and asked him to say this was the first night the pies were put in, and that he agreed to do so. He says that a week later at the home of his mother and in the presence of John Crak and several other drivers, he saw plaintiff; that plaintiff asked him if he had heard of Case-Moody's doing anything yet, and that witness said, "No." A warrant was taken out for the witness, but the prosecution was dropped. He now works for defendant corporation as a cake baker. He says he told the officials about the conspiracy and these transactions. They re-employed him and did not prosecute him because of a plea made to them by a sister.

John Crak says that on July 9th he saw plaintiff at the factory and heard him say to Mundy, "Here is the money," and that plaintiff turned over about \$2; that plaintiff asked him to put a couple of pies in his wagon because he had two pies that were not good; that he did so and plaintiff gave him a couple of cigars. He also testifies that he heard plaintiff tell Mundy he had better

leave town. This witness also was discharged by defendant corporation and now works for another company.

Mrs. Knowles, wife of Mundy, testified to the visit of plaintiff to their home, corroborating her husband.

The evidence shows that in July at a date which must have been prior to the taking out of the warrant, defendant corporation took the advice of counsel. Attorney Lloyd E. Brown, in the absence of his brother Charles, was called to the office of the company where he held a conference with Mr. Case, Mr. Fellar, and Mr. Dillon. Mundy was present and at that time signed a written statement prepared by the attorney. Lloyd Brown testified to the effect that plaintiff was also present, but plaintiff contends (plausibly, we think) that he was mistaken in this respect. The attorney says that plaintiff (we agree that it must have been Mundy) said that about \$75 worth of pies had been taken out and not accounted for, and that the proceeds were divided among those interested in the enterprise. Nicholas Barniecke was not present at this conference. Attorney Brown says that he told his clients that if they had the testimony of Barniecke they would be justified in swearing out a warrant against plaintiff. On cross examination he said that he did not advise specifically that plaintiff should be charged with having stolen 30 pies on July 10th of the value of \$15, nor was he informed by anyone that Henderson had told Barniecke to permit plaintiff to take these pies with his load, or that plaintiff had sold the pies at that time and accounted for the proceeds to defendants.

We think the foregoing is a fair summary of the evidence.

Plaintiff concedes that it is well settled law in this State in cases for malicious prosecution that where a prosecuting witness had submitted to a lawyer of good standing all the facts within his knowledge, or that he could have obtained by reasonable

James Brown. This witness also was interviewed by the witness.

Also was seen for another occasion.

Mr. Brown, wife of James, testified to the visit of

plaintiff to their home, corresponding her husband.

The witness above that in July of a late date must have

been prior to the taking out of the warrant, defendant's deposition

took the advice of counsel. Attorney Lloyd M. Brown, in the absence

of his brother Charles, was called to the office of the company

where he held a conference with Mr. Lane, Mr. Walker, and Mr. Miller.

For. Henry was present and at that time signed a written statement

prepared by the attorney. Lloyd Brown testified to the effect that

plaintiff was also present, but plaintiff contends (plainly, we

think) that he was mistaken in this regard. The attorney says

that plaintiff (we agree that it must have been Henry) said that

about the worth of the land had been taken out and not accounted for,

and that the proceeds were divided among those interested in the

diligence, and acts upon such advice in good faith, he cannot be held responsible; and this we understand to be the law. We think, however, there was a question here as to whether all the facts concerning the charge against plaintiff were submitted to the attorney. The evidence in that regard was conflicting and, we think, raised an issue for the jury. Lyons v. Lester, 285 Ill. 336. We cannot therefore hold as a matter of law that plaintiff is precluded because the proceeding against him was initiated on the advice of counsel.

The fact, however, that counsel was called, as well as the fact that the Judge who issued the warrant certifies that he took evidence, is entitled to consideration in determining the weight of the evidence bearing upon the issues of malice and probable cause. The courts of this State have always been vigilant in this class of cases in guarding against the danger that the jury may regard the acquittal of the plaintiff upon a criminal charge as justifying the inference that the prosecution was wrongfully begun. The record of acquittal is admissible only for the purpose of showing the determination of the proceeding. It has no bearing upon the question of want of probable cause or of evidence of malice. In a criminal case the burden of proof is upon the State to establish guilt beyond a reasonable doubt. In a suit for malicious prosecution the burden is upon plaintiff to prove by a preponderance of the evidence the absence of probable cause and the presence of malice. In Gollins v. Mayte, 90 Ill. 353, Chief Justice Breese said:

"Our experience teaches us there are few questions of law more difficult of comprehension by a jury, than those which govern trials for malicious prosecutions. It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why an innocent man may be prosecuted for a supposed crime or offense, and yet have no recourse against the prosecutor who caused his arrest and imprisonment, and yet the preservation of the peace and order of society require, that even innocent men may be compelled to submit to great inconvenience and hardship, rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable grounds to believe in the existence of guilt."

The fact that the examining magistrate heard evidence is not controlling. McSirey v. Catholic Press Co., 254 Ill. 890. The question here narrows itself down to the proposition of whether the verdict of the jury as to want of probable cause and as to malice is against the manifest weight of the evidence. As before said, there is no evidence of express malice. It does not appear that any officer or employee of the company had any ulterior motive, or any purpose other than the protection of the property and business of the corporation. The evidence shows beyond a reasonable doubt that some of the drivers purloined the pies of the corporation, and that several of them must have been parties to the pilfering. Defendants investigated; they employed counsel; they accused some of the drivers of whom plaintiff was one, and some of them confessed their guilt. Plaintiff did not confess, but if he was without guilty knowledge his reply to the accusation was, we think, most unfortunate and by no means well designed to allay suspicion. He was an intelligent witness and from a business standpoint he must have realized that the matter was a serious one for the corporation, although it might appear in some respects trivial. When the number of employees engaged in this line of service for the corporation is considered, the matter appears of great importance. Plaintiff made practically no endeavor to persuade his employer of his innocence. The evidence tended to justify suspicion. In the trial of the case his experienced counsel (wisely, we think) relied much upon the theory that although plaintiff might initially have appropriated the pies in question, the fact that he later by permission sold them and accounted to his employer for the proceeds, as a matter of law precluded the inference that he was guilty of any crime. His case was skillfully conducted on the theory that under such circumstances he could not be held guilty of larceny. The theory, to say the least, is doubtful. People v. White, 273 Ill. 424; People v. Lardner, 300

Ill. 264. In Thomas v. Muchlmann, 92 Ill. App. 571, this court said:

"The decisions of the courts incline toward an encouragement of criminal prosecutions when they are instituted in good faith, without malice, and for the purpose of punishing violators of the law, and for that reason suits for malicious prosecution are not favored and have been critically examined. Reynolds v. Kennedy, 1 Wilson, 232; McEean v. Rittenie, 18 Ill. 114; Murd v. Shaw, 20 Ill. 354; Israel case, supra, Barrett v. Healds, 70 Ill. 406; Angelo v. Faul, 35 Ill. 106."

In C. B. I. & P. Ry. Co. v. Pierce, 98 Ill. App. 363, this court said:

"The citizen who in good faith and without malice, under circumstances strongly tending to show guilt, institutes a criminal prosecution, should not be cast in damages because afterward upon a full investigation the suspicious circumstances are explained, and the innocence of the party accused made apparent. (Jacka v. Stinson, 13 Ill. 701; Collins v. Marie, 50 Ill. 353; Angelo v. Faul, 35 Ill. 106.) The courts incline to the encouragement of criminal prosecutions, when instituted in good faith, without malice, and for the purpose of punishing violators of the law, and for that reason suits for malicious prosecution are not favored."

We hold in this case that upon the issues of malice and want of probable cause the verdict of the jury is manifestly against the weight of the evidence. We may add that the damages allowed are also obviously, in our opinion, excessive.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

37704

MARGARET DEVEREAUX et al.,
Appellees,

vs.

GEORGE JORDAN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 628³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

John Jordan, a resident of Chicago, died at the Alexian Brothers Hospital June 7, 1929. He left his surviving a daughter, Margaret Devereaux, wife of Ray Devereaux, and a son, George Jordan, his only heirs. A written instrument executed February 12, 1926, purporting to be his last will and testament, was admitted to probate in Cook county September 14, 1928. On September 12, 1929, Margaret Devereaux filed her bill in chancery to contest the supposed will, alleging incapacity of the testator and undue influence. The cause was submitted to a jury which returned a verdict in favor of the contestant, and the court, overruling motions for a new trial, entered judgment on the verdict setting aside the will. Defendants ask this judgment be reversed.

It is contended, in the first place, that the court erred in permitting Ray F. Devereaux to testify. In the beginning he was joined as a complainant but before the trial was dismissed out of the case, and the court, over objection by defendants, then permitted him to testify at length. He was also cross examined by defendant. At the close of his evidence, however, all his testimony was stricken out on motion of defendants and the jury instructed by the court to disregard it.

It is conceded that Ray Devereaux was incompetent as a witness under section 3 of chapter 51 of the Revised Statutes, but complainant avers (and defendants deny) that the error was cured by striking out the testimony and giving the instruction to disregard

it. This point (with the other that defendants request for an instruction in their favor at the close of all the evidence should have been granted) may best be considered with their further contention (which, we think, is the controlling question in the case), namely, that the verdict and judgment are clearly and manifestly against the evidence.

It seems best to summarize some of the undisputed facts. As already stated, the supposed will was executed February 12, 1926. The estate disposed of is of the value of about \$23,000. The deceased at the time of his death was about 70 years of age. He had served for many years on the police force of Chicago and in that service became a sergeant. He retired from service on the police force and afterward worked as a night watchman for the Y.M.C.A.

John Jordan lived with his wife, Mary Jordan, up to the time of her death in March, 1928, in a home at 7727 South Shore Drive, the title to which was in her name. The daughter, Margaret Devereaux, her husband and three children lived in the same neighborhood at 2876 East 77th street. The children were all under ten years of age. Prior to the death of his mother, George, who was also married, lived at Gary, Indiana. The relations of George and his father at the time of the mother's death were somewhat strained; there were words between them just prior to her death and on the day of her funeral. George insisted on having his share of the mother's estate right away and persisted in that attitude until his interest was purchased. He received \$5000 for it. A few days after the mother's funeral Mr. and Mrs. Devereaux and their children moved into the home with John Jordan. In the settlement with George Jordan, it appears, Ray Devereaux furnished a part of the money and the title to the home was at first put in the name of Margaret Devereaux. The father afterward became dissatisfied, and it was then put in a joint tenancy. After receiving a share of his

11. This point (with the other two) is the only one which is not mentioned in their letter at the time of all the other points. It has been suggested that it may have been omitted with their letter and that (which, we think, is the correct reason in the case), namely, that the writer had intended to discuss the point in a separate letter.

It seems best to communicate some of the following facts to the public.

of our design is based, in a sense, on the fact that the
of our design is based, in a sense, on the fact that the

There were words between them that ended as now death had no end. They
at the side of her mother's death was answered elsewhere; there
lived at home, Indiana. The reputation of George and his father,
prior to the death of his mother, George, was well known.
They had very good. The children were all under ten years of age.

My husband and I have lived in the same neighborhood as

was requested. He received \$1000 for it. A few days after the estate rights were not revealed to him although until his interest

[illegible]

mother's estate George moved from Gary, Indiana, to Three Oaks, Michigan, and the father visited him there several times in the fall of 1935. About the same time his attitude toward his daughter and her family changed materially; in fact, he became very bitter toward them, so much so that he moved from the home and roomed with a family named Williams at 6167 Burnham avenue. Some of the Williams family testified in the case. Later he moved from there to the home of Mrs. Tilden (a widow) at 7741 South Shars Drive, which immediately adjoined the Devereaux home; he moved to that home in September, 1936, and remained there until he went to the hospital where he died; he was ill at the hospital about ten days.

Mrs. Devereaux was very much offended because Mrs. Tilden took deceased into her home and refused to speak to her. Feeling was intensified by occurrences after the death of deceased. Mrs. Devereaux went to see her father several times at the hospital - with what result the evidence does not disclose. However, she requested that the body be sent to her home, but George came and made arrangements to have it taken first to the undertaker and afterward to the home of Mrs. Tilden, from which place the funeral was conducted. The Devereaux family did not attend. Mrs. Devereaux protested to Father Lynch, who was in charge of the service and who at first advised that the body be sent to the home of the daughter, but George protested to him, saying that it was Mr. Jordan's express wish that his body should not be taken there under any circumstances, and Mrs. Tilden says that Father Lynch then said the body should be taken to her home.

At the time of the execution of the will the deceased was living at the home of Margaret and Ray Devereaux. It bears unmistakable evidence of lack of affection for his daughter, Mrs. Devereaux, to whom he bequeathed "the sum of one dollar," devising all the rest of his estate "to my son, George Jordan."

William's estate was never made, and the money was
never paid, and the estate was never made in the
fall of 1912. About the same time his estate was made
and his family was very poor; in fact, he became very poor
toward them, so much so that he moved from the home and roomed with
a family named Williams at 1017 Broadway Avenue. Some of the Williams
family resided in the same. After he moved from there to the same
of Mrs. William (a widow) at 1017 Broadway Avenue, about 1912-1913,
joined the Government home; he moved in that home in December,
1912, and remained there until he went to the hospital where he
died, in the fall of the hospital about the 1913.
Mrs. Government was very much affected because Mrs. William
had returned into her home and returned to work in her. Working
was interrupted by circumstances after the death of William. Mrs.
Government went to see her father several times at the hospital -
this was about the middle of the year 1913. However, the
question that the body he sent to her home, but George knew and was
attempts to have it taken first to the undertaker and afterwards
to the home of Mrs. William, from where along the funeral was con-
ducted. The Government family did not attend. Mrs. Government was
located in Kansas City, and was in charge of the funeral - and was
as first advised that the body he sent to the home at the hospital,
but George protested to him, saying that it was Mrs. William's expense
when that his body should not be taken there under any circumstances,
and Mrs. William says that William told her that he would be
taken to her home.
At the time of the execution of Mrs. William the deceased was
living at the home of William and Mrs. Government. It seems certain
that the evidence at lack of evidence for his daughter, Mrs.
Government, is that he was called "the son of the father," having
all the rest of his estate "as my son, George Jordan."

Robert M. Hogan was the attorney for deceased and Mr. and Mrs. Devereaux in the controversy with George over the estate of the mother. John Jordan was first named as administrator of his wife's estate; later Margaret Devereaux was substituted at his request. In January, 1926, deceased filed a partition suit against Ray and Margaret, apparently for the purpose of getting away from the joint tenancy created in the lands of his deceased wife at his own suggestion, but the record contains only meager details as to this proceeding.

Hogan says that the mental attitude of the deceased changed in the autumn of 1925; that the deceased came to his office very frequently and cried "occasionally;" and that he saw him often in December of that year and in January, 1926. Hogan expresses the opinion that John Jordan was not then fully conversant with his own affairs. The mental attitude of the testator during that period may be gathered somewhat from letters placed in evidence by defendants — some of them written apparently to Mrs. Hilden and others to his son George. It does not appear whether there were any letters from these parties to deceased. In a general way the letters show a violent antipathy on the part of deceased to the Devereaux family, and this antipathy apparently extended even to the children; he writes that they spit in his soup. The letters indicate that the writer was offended about financial matters but do not state any just cause of complaint in that respect.

The situation in the Devereaux home when he lived there and the relations between deceased and the Devereaux family are narrated by a disinterested witness, Charles E. Bacon, who lived in the home from October, 1925, until the latter part of the spring of 1926. He says that Mr. and Mrs. Devereaux were as kind and considerate to deceased as anyone could possibly be; that their children treated him with all respect, but at no time was deceased like other people.

[illegible]

The witness, however, noticed that about two weeks or a month after he went there the attitude of deceased changed materially; he says that deceased became nervous, sullen and abnormal; that he paid little attention to Mr. and Mrs. Devereaux; that he was often invited to eat with the family, particularly on Sundays, but he refused and never accepted the invitations given him; that he asked the deceased the reason for this and deceased said he wasn't going to give anybody a chance to poison him.

Mr. Bacon worked in the basement on radio sets and he says deceased several times came to witness and asked him to walk with deceased into a separate basement; that witness asked him the reason and deceased said he didn't want to walk into a trap; he also says that deceased would go to bed early in the evening but would often be found at midnight walking in the halls, and one night the family found the gas jet turned on under circumstances which indicated the deceased must have done it. He also says deceased made underclothing for himself out of cement sacks; that he would many times be found crying in the middle of the night; that Mrs. Devereaux was afflicted with a goiter and went to the hospital to receive treatment; that her father did not bid her goodbye before she went but later he talked with witness in the basement about her going and cried about it.

Mrs. Maude Lynch was the niece of John Jordan; her mother was dead and she had lived much of the time at the Jordan home when she was a child. She testified that John Jordan visited in her home in 1925 on an average of once a week, sometimes three times, and that he would often stay over night; that she also saw him in the early part of 1926 and knew of the relationship between Margaret Devereaux and him; that in the first part of the year he spoke of Margaret as a "wonderful" daughter and mother and said he didn't know what he would do if it wasn't for her; that he spoke in similar terms in regard to Margaret's husband and children. This witness also knew of the visit

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The witness, however, advised that when he was in a small office he was there but advised of business changes occasionally; he says that business became normal, quiet and pleasant; that he said little conversation to Mr. and Mrs. Stevenson; that he was often invited to eat with the family, particularly on Sundays, but he refused and never accepted the invitation after that; that he never saw Frederick the person who told him about the business and he was not in the office.

[illegible]

1. The first thing I noticed when I stepped out of the plane was the cold, crisp air. It felt like a blanket after a long, hot journey. The ground below was a vast, flat expanse of white, stretching out to the horizon. In the distance, I could see the faint outlines of mountains, their peaks softened by the distance. The sky above was a pale, hazy blue, with a few wispy clouds scattered across it. The overall atmosphere was one of quiet solitude and vastness. I took a deep breath, savoring the fresh air and the sense of being in a new, open world.

of deceased to the home of his son George, and she says that when he returned from that visit his attitude was entirely different; that he told her he had nailed the door so Margaret or Ray couldn't get into his room; that when he stayed at night she would often find him walking up and down the halls through the house; that at these times he would be talking to himself in a loud voice; she too saw him in the basement making undergarments out of cement sacks; she also says that deceased drank same; that from the way deceased acted at her house she thought he was getting into his dotage; she says he talked about Margaret "getting calls from men" and Ray going out with his girl friends; that she called on him at the hospital and saw him the day before he died and he knew her; that in the fall of 1935 when he visited her he had a little box in which he told her he had \$5000, and he also said he had money hidden all over the rafters of the basement. She also said she heard a threat made by George to his sister Margaret on the day of the mother's funeral to the effect that if she did not do as he wished about the estate he "would open up to the old man about her."

The evidence of Maude Lynch is corroborated by that of her husband, John Lynch, as to the unusual and abnormal conduct of John Jordan at their home; he says John Jordan called his daughter a "bitch" and a "brat."

Katherine A. McGrath, a cousin of Margaret Devereaux, testified she was a frequent visitor at the home of Margaret Devereaux in 1925; she testified to the happy relationship existing between deceased and the Devereaux family at that time; said she never heard of a quarrel among them; she says that later in the year the attitude of John Jordan in this respect changed; that he insisted on cooking his own food and refused to eat with the Devereaux family when invited to do so.

Mrs. Wilden testified as to the life of deceased at her

home, where he had a room but prepared his own meals. She said she had no personal knowledge of any arguments or disputes between deceased and the Devereaux family, but that deceased told her his reasons for moving, saying that his son-in-law threatened to strike him and that the children were very saucy and even spat at him; that he complained that Mrs. Devereaux never prepared a meal for him and did not care for his room; she also tells of the narration by deceased of trouble at the Devereaux home when he said the police were called; she says he told her he had made a will leaving his property to the three grandchildren, but that after his trouble with them he made a second will leaving everything to his son except a dollar to his daughter to show he remembered he had a daughter, and that he wanted his son to have everything. She says she invited deceased to come and make his home with her because he said he was not happy where he was.

Mr. Melaniphy, a witness to the will in question and an attorney, testified as to the factual matters in connection with the execution of the will and that George Jordan was not present at that time; he had known deceased very well from 1909 to 1912, but did not see him frequently in 1925 and 1926; he handled some litigation for him in 1925 and says, "at that time I would say he was of sound mind."

Donnellon, the undertaker who served at the death of both Mr. and Mrs. John Jordan, says that when he buried the wife in 1925 Mr. Jordan seemed to be of sound mind, but up to 1926 he saw him occasionally, maybe once or twice a month, in a casual way and conversed with him; that he did not think his mind was any different at any of these times.

Joseph Gaspodarek was not acquainted with deceased but "dropped in" the law office of Peden, Kahn & Murphy when the supposed will was executed and signed as a witness; he says deceased "appeared to me to be normal as a man of sense and judgment at that time."

There, where he had a time had purchased his own home. He said
 she had no personal knowledge of any movements or interests between
 deceased and the Government family, but was deceased with her
 friends for weeks, saying that she was in the interest in all the
 him and that the children were very young and even aged at six; that
 he concluded that was. Deceased never received a word from him and
 did not write for his home; she also fails of the mention by de-
 ceased of friends of the Government name when he said the sister was
 called; she says he said that he had with a will leaving his property
 to the three grandchildren, but that after his death with them as
 made a record will leaving everything to him and except a dollar to
 his daughter as when he purchased he had a daughter, and that he
 wanted his son to have everything. She says she invited deceased to
 come and take his home with her because he said he was very happy
 there he was.

Mr. Calamaghy, a witness to the will in question and an ex-
 ecutor, testified as to the formal matters in connection with the
 execution of the will and that George Jordan was not present at that
 time; he had been deceased very well from 1911 to 1912, but all and
 see his property in 1912 and 1913; he testified some difficulty for
 him in 1912 and says, "at that time I would say he was of sound mind."
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 vinced with him; that he did not believe his mind was any different at
 any of those times.

George Deceased was not acquainted with deceased but
 "proved in" the law office of Edwin, John A. Murray when the subject
 will was executed and signed as a witness; he says deceased "proved"
 to be to be normal as a man of sound mind and judgment at that time.

Edward J. McCormick, a city fireman, lived about six blocks from the home of deceased and became acquainted with him in 1926, conversed with him frequently and thought him to be of sound mind.

John White, a police officer for more than 25 years, knew deceased, who was his commanding officer and a member of the Policemen's Benefit Association; he collected the dues and assessments from deceased every month; he says he never discovered anything unusual or abnormal about him before 1926 or after; he had not discussed his personal or property affairs. The beneficiary of the Policemen's Benevolent Association insurance policy after the death of his wife was changed by deceased to his son and daughter and afterward, he did not know when, to his son.

James Heavey, a city fireman, first became acquainted with deceased some time in 1926, when the deceased would come into the fire station where witness was; he had daily talks with him about "things and affairs;" he says, "My opinion as to what his state of mind and memory during my acquaintance with him is he appeared right sharp;" he also says he knew deceased until he passed away and did not discover him changed in his mental makeup.

Edward Sheridan, a city fireman, first made the acquaintance of deceased in 1926, he thinks in the spring; he says it was a daily habit of deceased to visit with the firemen; that he conversed with him, had an opportunity to observe his mental makeup, and in his opinion deceased "had a remarkable memory;" he says he never talked about his family and never showed any prejudice toward anyone.

In support of their contention that defendants' motions for an instruction in their favor at the close of all the evidence and for a new trial after the verdict of the jury had been returned should have been allowed, first, for the reason that there was no evidence tending to show either undue influence or insanity, and second, because the verdict was clearly and manifestly against the

evidence, - many cases are cited, such as Brownfield v. Brownfield, 43 Ill. 186; Rutherford v. Morris, 77 Ill. 397; Aminia v. Baitez, 347 Ill. 353; Long v. Brink, 353 Ill. 549; Miller v. Miller, 3 Serg & Rawle 269. These cases, in substance, hold that undue influence which will avoid a will must be of such nature as to deprive the testator of his free agency. Assuming that the testator here was free from mental infirmity, we think the evidence falls short of proving the exercise of such influence upon him by his son George as alleged. The evidence however, would justify the inference that George Jordan had the will and opportunity to exert such influence upon his father, and it is a fact established by the evidence that (whatever the reason or method may have been) the result he desired came to pass. Neither, in our opinion, is the evidence sufficient to prove generally that John Jordan at the time he executed the supposed will was insane in the sense that he was not mentally able to conduct his business affairs or that there was mental infirmity on account of which he was not able to keep in mind the persons who would naturally become the recipient of his bounty. If the verdict of the jury is to be sustained, it must be upon a different theory. Plaintiff suggests that the rule which should be applied here is stated in American Bible Society v. Price, 115 Ill. 623, where the court said (p.637):

"In Searle v. Galbraith, 73 Ill. 272, we recognized that there may be insanity without the general business capacity of the individual being affected thereby. ***

Beyond all question it is within the previous rulings of this court, and abundantly sustained by the rulings of other courts of the highest respectability, that where there is insane delusion in regard to one who is an object of the testator's bounty, which causes him to make a will which he would not have made but for that delusion, such will cannot be sustained; and so, also, where there is insane delusion in regard to the duty or moral obligation of a party to make a will in favor of a particular individual, corporation or society, and a will is made as the result of that insane delusion, it cannot be sustained. 1 Redfield on Wills, (3d ed.) 73, 74, at pag. and notes; 1 Jarman on Wills (8th ed.) 38, at pag. and notes; Buswell on insanity, secs. 13, 381."

In Anlicker v. Brethorst, 329 Ill. 11, it was held the court erred in refusing the following instruction (at p. 13):

...and many cases are cited, such as Wheeler v. Wheeler, 101 N.H. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"The court instructs the jury that if you believe from the evidence that, although Seipt L. Von Brethorst had sufficient mental capacity to attend to the ordinary business affairs of life, yet, that, with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was of unsound mind; and that while laboring under such conditions, if any, he made the will in question, and that in making it, he was so far influenced or controlled, by such unsoundness of mind, if any, as to be unable, rationally, to comprehend the nature and effect of the provisions of the will, and was thereby led to make the will, as he did make it, then the jury must find the will not to be the will of the said Seipt L. Von Brethorst."

The court said that this instruction was substantially similar to one approved by the court in Sinbar v. Sinbar, 317 Ill. 561. This rule of law is well established in this State by these and other decisions. Petefish v. Becker, 176 Ill. 448.

Examining evidence in this case from this standpoint, we think it is apparent there was abundant evidence for the consideration of the jury. Indeed, the significant fact appearing from an examination of the evidence is that there is practically no conflict in it when thus considered. The evidence shows without contradiction that after the death of Mrs. Jordan in 1923 deceased regarded his daughter Margaret, her children and her husband with great love and affection; that a few months thereafter he came to regard them all with the utmost hatred and that there was no reasonable cause for this change of mind on his part; that as a direct result of this abnormal condition of his mind the will here in controversy was executed. That he was thus influenced is conclusively established by the testimony of Mrs. Tilden, who is a witness for defendants and such relied on by them.

As illustrative, one witness uncontradicted testified to an abnormal fear on the part of the testator that he might be poisoned if he ate with his daughter's family. Another witness tells how the deceased accused his daughter, the mother of his three little grandchildren, of improperly receiving calls from men. Defendants produced many witnesses who give their general impression of the ability of deceased to conduct his business, but no witness gives

evidence tending to show that these abnormal conditions of mind did not exist, or that there was any reasonable basis in fact for them. A father who at one time boasts of the loyalty and fine qualities of his daughter and shortly thereafter, without basis in fact, asserts his fear that he will be poisoned if he eats with her, and at the same time, with a like lack of evidence, charges her with disloyalty to her family, raises a question for the jury as to his sanity.

In causes in chancery, such as this, the cases cited show that the issue submitted to the jury is not feigned but real, and the verdict of a jury is not simply advisory but binding upon the conscience of the chancellor (as would be the verdict of a jury returned on an issue of law) unless manifestly and clearly against the weight of the evidence. The chancellor in this case so held. This court will be slow to set aside the verdict of twelve jurors which has been approved by the chancellor who, with the jury, saw and heard the witnesses.

There was, as already pointed out, a technical error in the admission of the testimony of Ray Devereaux. Brownlie v. Brownlie, 381 Ill. 78. It was stricken out and the jury instructed to disregard it. It appears in the abstract of the record, and we have read it carefully. We do not think it injured defendants' case. Indeed, much of it was in their favor and, although stricken, is quoted and relied on in the printed argument which defendants have submitted to this court. Under such circumstances we hold the error in its admission harmless.

Defendants have argued that the court erred in refusing a motion made by them at the close of plaintiff's evidence for a verdict in their favor because the alleged will had not been offered in evidence by plaintiff. That point, however, was waived when defendants offered evidence in their own behalf.

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is common to observe, even in this, the most difficult case
that the issue referred to the jury is not always the same, and
the verdict of a jury is not always entirely satisfactory from the
point of view of the court (as would be the verdict of a jury not
trained on an issue of law) and not necessarily and always a fair
weight of the evidence. The question is still open as to
what will be done to see that the verdict of a jury is not
too far removed from the evidence, and the jury, and the

There was, as already indicated, a technical error in the
transmission of the testimony of Ray Government. Exhibit A, Exhibit B,
and Exhibit C were submitted and the jury instructed to take
note of it. It appears in the statement of the record, and we have read
it carefully. We do not think it injures defendant's case. Indeed,
even if it was in itself true, although untrue, it would not
rely on the stated statement which defendant has admitted to
this court. Under such circumstances we will not error in the
admission of the same.

Defendants have argued that the court's ruling is violating a motion made by them as the class of "disgruntled" employees for a verdict in their favor because the alleged will has not been shown in evidence by Plaintiff. That being, however, the stated reason, Defendants offered evidence in this way below.

Plaintiff in her brief for the first time moved to dismiss the appeal for alleged failure to file a supersedeas bond as provided by section 76 of the Civil Practice act, in force January 1, 1934. The motion comes too late and moreover is wholly without merit. It will therefore be denied.

The decree entered upon the verdict of the jury for reasons heretofore expressed is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

The United States has been very successful in its efforts to bring about a peaceful settlement of the Korean question. It has been able to secure the withdrawal of Chinese troops from North Korea and to bring about the signing of the Armistice Agreement between the United Nations Command and the North Vietnamese. The United States has also been able to secure the release of American prisoners of war and to bring about the signing of the Geneva Convention on the Status of Refugees.

1. *Chlorophyll a* and *Chlorophyll b* content

37730

ALBERT K. ORSCHNEL,
Appellee,

vs.

UNION INDEMNITY COMPANY,
a Corporation, et al.,
Appellees.

On Appeal of UNITED STATES
OF AMERICA,
(Intervening Petitioner),
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 628⁴⁻

MR. JUSTICE MATHESY DELIVERED THE OPINION OF THE COURT.

Orschnel is the assignee of certain judgments obtained against the Union Indemnity Co., a Louisiana corporation, in the Federal court sitting in Illinois. He filed in the Superior court of Cook county his bill, amended and supplemental, known as a creditor's bill in the usual form and based upon section 49, chap. 22 of Cahill's Ill. Rev. Stats., 1933. The bill appears to be for the sole benefit of plaintiff and was not brought in behalf of creditors generally. The Union Indemnity Co. and W. Irving Moss were named defendants. The Union Indemnity Co. did not appear or answer and was defaulted, and on motion of plaintiff James F. Campbell was appointed receiver.

The amended and supplemental bill, upon which the decree was entered, was filed June 12, 1933. The decree was entered December 27, 1933. The decree found the necessary jurisdictional facts as to the filing of the amended and supplemental bill, the recovery of the judgments, etc.; that Campbell as receiver had in his hands for distribution, as shown by his report, a sum in excess of \$2000, which he was directed to turn over to plaintiff. The decree ordered that a copy of it should be sent by registered mail to the Receivers of the Union Indemnity Co., and to the Collector of Internal Revenue at New Orleans, Louisiana, and to the Collector of Internal Revenue of the State of Wisconsin.

ALBERT E. GORDON,
Applicant.

vs.

UNION UNIVERSITY COMPANY,
Respondent.

In support of Petition for
Injunction, Respondent,
Applicant.

MR. JUSTICE LATIMER, in his opinion, delivered.
The record in the case of certain patents issued
to the Union University Company, in the
Federal court sitting in Illinois, on June 10, 1903, and on a
Bill in the same term and based upon section 49, Chap.
22 of Smith's Ill. Rev. Stat., 1903. The bill appears to be for
the sole benefit of plaintiff and was not brought in behalf of
any other person. The Union University Co. and V. Irving were
named defendants. The Union University Co. did not appear in
answer and was defaulted, and an order of default was entered.
The amended and supplemental bill, upon which the record
was entered, was filed June 12, 1903. The record was entered on
August 27, 1903. The record shows the following facts:
That as to the title of the amended and supplemental bill, the
Petition of the Respondent, etc.; that plaintiff as respondent and in
his hands few dispositive, as shown by his record, a man in an
case at 1903, which he was alleged to have over to plaintiff.
The record shows that a copy of the bill was by registered
mail to the Respondent of the Union University Co., and to the
Index of Internal Revenue of the United States, and to the
Minister of Internal Revenue of the State of Illinois.

On April 6, 1934, the United States of America filed its intervening petition, averring that it was a corporation sovereign and body politic; that the judgment debtor corporation is indebted to it upon bonds given to certain Collectors of Internal Revenue for the payment of taxes; that by virtue of section 3466 of the Revised Statutes the United States was entitled to a decree that its right was paramount and that these obligations be first paid out of the property of the defendant debtor. Petitioner prayed that the decree in favor of plaintiff should be set aside to the extent that the claims of petitioner should be first satisfied.

Plaintiff answered, admitting formal allegations but averring that he was without information with regard to the liabilities alleged by the government to be due to it, and denying specifically that it was entitled to have its claims satisfied out of the assets in the hands of the Receiver.

An amendment to the petition of the government filed May 25, 1934, averred that the government objected to the decree on the ground that it was issued after and during the time the Union Indemnity Co., defendant, was insolvent and when a receiver had been appointed; that immediately upon defendant's insolvency the United States was entitled to preference over all other claims to whatever funds were possessed by the insolvent defendant. The amendment prayed that it might be received and filed; that the court enter an order setting aside the former decree and that the priority rights of the United States over other claimants to the funds of the insolvent company should be recognized.

June 16, 1934, the court entered a decree denying the prayer of the petition and overruling the objections. The decree specifically directed the receiver not to deliver any assets to Gray W. Beckner and Sanford Levy as Receivers for the Union Indemnity Co., or to deliver any of the assets to any person other than plaintiff;

On April 4, 1914, the United States of America filed its
information petition, whereby it was a corporation having
and body politic; that the petition was presented in English
it is upon bonds given to certain collectors of Internal Revenue
for the payment of taxes; that by virtue of section 2201 of the
United States the United States was entitled to a license from
the right was purchased and that these obligations be first paid
out of the property of the defendant before. Defendant prays
that the license be given to plaintiff should be set aside so the
license that the license of plaintiff should be first satisfied.
Plaintiff answered, stating that defendant's petition was
that it was without information with regard to the obligation
alleged by the government to be due to it, and denying essentially
that it was entitled to have the license satisfied out of the assets
in the hands of the defendant.
An amendment to the petition of the government filed May
27, 1914, stated that the government alleged in the petition was
known that it was found after and during the time the United States
city of Baltimore, was involved and was a receiver had been ap-
pointed; that immediately upon defendant's inventory the United
States was entitled to preference over all other claims in respect
to the assets of the defendant. The government
prayed that it might be removed and filed; that the court order an
order setting aside the license decree and that the priority rights
of the United States over other claimants to the funds of the de-
fendant company should be recognized.
June 12, 1914, the court entered a decree setting the matter
of the parties and reversing the judgment. The decree specified
that the license be set aside and the license be given to the
government and that the license be given to the United States of America
to be satisfied out of the assets in the hands of the defendant.

further, that the receiver forthwith pay plaintiff the \$2000 in accordance with the decree theretofore entered December 27, 1923. The decree which we are asked to review in this case contains no special finding of facts, nor is it supported by a certificate of evidence.

The government of the United States relies upon section 3466 of the United States Revised Statutes, which is as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority ^{herein} established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This section 3466 was formerly section 5 of an act entitled, "An Act to provide more effectually for the settlement of accounts between the United States and receivers of public money," enacted in 1797, chapter 20, 1 Stat. 518, and amended by an act in 1799, section 65, chapter 22, 1 Stat. 476, and the language has not been substantially varied since the original enactments. Spokane County v. U. S., 279 U. S. 80. Its validity was strenuously contested but seems to have been settled in favor of the government in U. S. v. Peters, 5 Cranch 115. In the early case of U. S. v. State Bank of North Carolina, 6 Pet. 29, it was pointed out by Mr. Justice Story that the claim of the United States under this statute did not stand upon any sovereign prerogative as at common law but was to be found exclusively upon the actual provisions of the statute, which by reason of the public interest was, however, to have a liberal construction. Many of the ^{states} ~~states~~, including Illinois, have based similar claims upon sovereign prerogative as a part of the common law adopted by them. People v. Farmers State Bank, 335 Ill. 617.

In a long line of decisions the courts have liberally construed the word "debts" as it appears in the statute. The

County of Spokane case held that the statute was applicable to taxes due to the United States from an insolvent debtor, and People v. Enclay, 238 U. S. 390, held that such a debt had priority over a claim of a state for franchise taxes due but not liquidated. The United States courts have also held, as we read their decisions, that in order that the statute may be applicable to particular property, some one of these situations must be made to appear: that (1) the owner of the property is insolvent, (2) the estate in the hands of executors or administrators is insufficient to pay all the debts due, (3) the debtor not having sufficient property to pay his debts, has made a voluntary assignment, (4) the estate and effects of an absconding, concealed or absent debtor have been attached by process of law, or (5) the owner has committed an act of bankruptcy. The statute does not create a lien upon the property of such debtors in favor of the government but only provides for a preference in course of administration in such cases. Hession v. Farmers Bank of Delaware, 13 Pet. 102, 9 L. Ed. 1017. In that case the Supreme court said:

"From the language employed in this section, and the construction given to it from time to time, by this Court, these rules are clearly established; first, that no lien was created by the statute; secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section; and, fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property."

In the much later case of U. S. v. Oklahoma, 261 U. S. 253, the court, reviewing prior authorities, again lays down the rule that the statute in question does not create a lien and holds that although the state banking board of Oklahoma acting under the statute of that state had taken over the assets of a bank for administration, the bank being unable to pay its depositors, this did not amount to insolvency within the meaning of section 3406. The court

said that under the Bankruptcy Act of July 1, 1898, a person was deemed insolvent whenever the aggregate of his property, exclusive of property conveyed, concealed, etc., with intent to defraud, hinder or delay his creditors, should not, at a fair valuation, be sufficient in amount to pay his debts, but that the Oklahoma law did not so limit the meaning of the term "insolvency," and that the bank was not therefore insolvent within the meaning of this section and the property in the hands of the bank commissioner was not subject to the provisions of this section.

Plaintiff here contends that by means of his creditor's bill he acquired a first and prior lien upon the assets of the judgment debtor, not for the benefit of the creditors generally but for his own benefit, and that the proceedings here are not of such nature as would divest this lien and make the preference provided by section 3466 applicable. The amended and supplemental bill here, as already stated, was based on section 49 of chapter 22 (Sahill's Ill. Rev. Stats. 1933, chap. 22, sec. 49), and the courts of Illinois have held that in such proceeding by way of a creditor's bill, the receiver appointed is not necessarily a trustee for the benefit of all the creditors but only for the benefit of those creditors in whose behalf he is appointed. Young v. Clapp, 147 Ill. 176. The same case holds that in such proceeding a transfer made by the judgment debtor to the receiver under the order of the court is an assignment not for the benefit of creditors but rather for the payment of the judgments on which the action is based; that by such transfer the receiver does not become the agent of the debtor for the distribution of the property in the same sense in which the assignee becomes the agent of the assignor, where there is a general assignment for the benefit of creditors; that, on the contrary, such an assignment by the judgment debtor partakes of the nature of a mortgage for the payment of the judgment. Illinois cases also hold that the filing of such bill and the obtaining of

which shall occur the day after the day of July 1, 1892, a person was
deemed himself whenever the signature of his company, and
of property conveyed, conveyed, etc., with intent to defraud, which
or delay his creditors, and that, as a legal consequence, he will
claim in amount to pay the debt, but that the claimant for his part
to limit the meaning of the term "intentionally," and that the bank was
not therefore innocent within the meaning of this section and the
property in the hands of the bank consequently was not subject to
the provisions of this section.

Wisconsin have contained that by means of this creditor's
bill he acquired a right and prior claim upon the assets of the
debtor, and that the benefit of the creditor's generally
not for his own benefit, but that the proceedings here are not of
such nature as would divest this claim and make the preference pro-
vided by section 530 applicable. The amount and property
bill here, as already stated, was based on section 53 of chapter
38 (Wisconsin's N. P. Act, 1892, ch. 38, sec. 40), and the
assets of Illinois have been used in such proceeding by way of
a creditor's bill, the receiver was not in such proceeding
because for the benefit of all the creditors and only for the
benefit of those creditors in whose favor he is appointed. The
T. 380, 1892, ch. 38, sec. 40. The same rule holds that in such proceeding
a transfer made by the debtor before the receiver was not
order of the court is an assignment not for the benefit of creditors
but rather for the payment of the judgment on which the action is
brought, and by such transfer the receiver does not become the agent
of the debtor for the distribution of the property in the case, and
in which the business becomes the agent of the receiver, whose duty
is a general assignment for the benefit of creditors; that, on the
contrary, such an assignment by the insolvent debtor previous to the
issuance of a mortgage for the payment of the judgment of Illinois
cases also that the filing of such bill and the recording of

service constitutes lis pendens and amounts to an equitable levy. Russell v. Chicago Trust & Savings Bank, 139 Ill. 538; Union National Bank v. Lane, 177 Ill. 171; Single v. Clear Creek Drainage District, 281 Ill. 311. The rule in the Supreme court of the United States appears to be the same. McCall v. Barker, 187 U.S. 168.

Plaintiff therefore contends that there are no facts in this case bringing it within the provisions of this section of the statute; that there is no proof that the judgment debtor is insolvent within the meaning of the statute, or that the debtor is without sufficient property to pay its debts, or that it has made a voluntary assignment, or that it has absconded or concealed itself, or that its estate or effects have been attached by process of law, or that it has committed any act of bankruptcy. Without undertaking to review the cases at length, we think this contention must be sustained under not only the early but also the later decisions of the Supreme Court of the United States. Bramwell v. U. S. Fidelity Co., 269 U. S. 463; Price v. U. S., 269 U. S. 492; Stride v. U. S., 269 U. S. 503; U. S. v. Mutterworth Corp., 269 U. S. 504.

We do not doubt the contention of the district attorney for the government that the laws of the state cannot supersede those of the United States. It is established by practically all of the authorities, one of which is U. S. v. Oklahoma, 261 U. S. 263, on which he relies, but that is not the controlling question here. The law of the United States is, of course, supreme wherever applicable, but we hold that properly interpreted under the rules of the United States Court, it is not applicable to a situation such as disclosed by this record.

The attorney for the government also contends that since plaintiff's judgments were obtained in the United States Court for the Northern District of Illinois, plaintiff could not maintain a creditor's bill based upon these judgments in the Superior court of Cook county. In other words, he contends that in the courts of

Illinois, federal judgments are foreign judgments. As cited in this connection Stearns v. Heagland, 38 Ill. 264; Corn v. Greenberg, 181 Ill. App. 689; Ladd v. Hudson, 174 Ill. 344, and other cases which would seem to sustain the contention.

By the Act of July 1, 1909, the legislature of Illinois provided for regulation of liens of judgments and decrees of courts of the United States and declared that such judgments within this State and all writs, returns, certificates of the levy of a writ and records of the courts should be registered, recorded, docketed, indexed or otherwise dealt with in the public offices of this state, so as to make them conform to the rules and requirements relating to judgments and decrees of courts of this state. Cahill's Ill. Rev. Stats. 1935, chap. 77, sec. 81. In 1929 the legislature of this state enacted a statute which provided that judgments and decrees of courts of the United States held within this state should be a lien upon the real estate of the person against whom they were obtained, situated within the county in which the court was held from the time rendered or revived, and that upon filing in the office of the clerk of any court of record in any county in this state, of a transcript of a judgment or decree of a court of the United States rendered in any other county of this state, such judgment or decree should be a lien upon the real estate of the person against whom the same is obtained, in the county where filed, "in like manner as judgments and decrees of courts of record of this State." Cahill's Ill. Rev. Stats. 1935, chap. 77, sec. 82, page 1720.

The Congress of the United States has also enacted a statute which provides that judgments and decrees rendered in a district court of the United States within any state, should be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such

which would seem to indicate the conclusion.
 FBI file 100-368617, dated 11-1-50, and 100-368617-1
 and 100-368617-2, dated 11-1-50, and 100-368617-3, dated 11-1-50.
 Chicago, Illinois, December 11, 1950. The letter to
 Chicago, Illinois, December 11, 1950.

[illegible][illegible]

The Congress of the United States has also enacted a statute which provides that indigenous and native peoples be a distinct count of the United States within any state, should be issue as property throughout such state in the same manner and to the same extent and under the same conditions as if such persons and groups had been declared by a court of general jurisdiction to have

state. See Title 28 Judicial Code, sec. 812.

Some of the Illinois cases cited were decided before the enactment of these statutes. In some of the cases decided thereafter were these statutes called to the attention of the court. Since the enactment of these and similar statutes it has been held in other states that judgments of Federal courts are not to be considered within the state where rendered as foreign judgments, and that creditors' bills may be based thereon. Chicago & Atchison Bridge Co. v. Fowler, 55 Kan. 17; Nelson v. Altburg, 124 Kan. 296; First National Bank v. Sloan, 42 Neb. 350; Ballin v. Importing Co., 75 Wis. 404. We approve the reasoning of these cases in the absence of any authority from our own state. Moreover, we are of the opinion that the intervening petitioner having asked the benefit of this proceeding in the state court and the subject matter of the suit being one of which the Superior court of Cook county had jurisdiction, petitioner cannot now be heard to urge this contention. Dilworth v. Curtis, 139 Ill. 504; Grier v. Gable, 153 Ill. 39; Knap v. McCaffrey, 179 Ill. 107; Perot v. Kirk, 230 Ill. 521; Wilson Bros. v. Raaga, 347 Ill. 140; Bartunek v. Lastovken, 350 Ill. 380.

For the reasons indicated the judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

O'Connor, P. J., and McGuire, J., concur.

DATE OF DEATH: 08-11-1967

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11. I have not been asked the results of this proceeding in the above

and the subject matter of the said action was of value

Learned, thoughtful, and intelligent, and please look to your future.

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For a complete list of examples, see the following examples:

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

[illegible]

37739

JESS E. BIRBLE,

Appellee.

vs.

OSCAR NELSON COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 628⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract for commissions claimed on accounts of sales of liquor and upon trial by the court, there was a finding for plaintiff with judgment for \$703.50, which defendant asks us to reverse on the ground that the finding and judgment are against the manifest weight of the evidence.

Defendant was formerly known as the Foreign Traders Co. It appears that in November, 1933, anticipating the early legalization of the traffic in liquor, defendant company was organized for the purpose of negotiating in the business of supplying liquor of different kinds to the trade in Chicago. The president of the defendant company was Louis Dolan and a Mr. Mulcahy acted as his assistant. Arthur L. Johnson was cashier. Joseph Hiran occupied the position of general manager in charge of the wholesale department, and George W. Hipple was sales manager in charge of the retail department. Plaintiff, with numerous other persons (it seems about 30 in number) were employed to begin selling liquor of defendant on commission upon the legalization of such sales. Plaintiff was employed through Mr. Hipple, and the terms of the agreement, which were almost entirely oral, are in dispute. It is admitted, however, that plaintiff was furnished with blank papers, copies of which are in evidence as plaintiff's exhibits. One of these is designated, "Salesman's Daily Report," and thereon appeared appropriate blanks designed to be filled in by the salesman showing his name, the territory in which he worked, the date of contact with the prospect, the prospect's name and

STATE

DEPT. OF JUSTICE

WASHINGTON

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57-14488

RE: THOMAS ALVA EDISON THE INVENTOR OF THE LIGHT BULB

On or about the 10th day of November, 1934, the undersigned, being duly sworn, depose and say that the following is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above.

The undersigned, being duly sworn, depose and say that the following is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above.

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The undersigned, being duly sworn, depose and say that the following is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above, and that the same is a true and correct copy of the report of the undersigned, dated and captioned as above.

address, his classification and the amount of the order taken. Another of these papers is dated November 21, 1933, and is designated, "Confidential Retail Commission Schedule For Salesman," and thereon appears in printed type the commission "based on present prices, subject to change," of various brands of whiskeys, champagne, wine, etc. A "Supplementary Confidential Retail Commission Schedule," dated December 21, 1933, also based on present prices, subject to change, appears in evidence as plaintiff's exhibit "2."

The date of plaintiff's employment is not definite, but the evidence indicates that it began about November 7, 1933, and ended the latter part of December of the same year. The items in dispute between the parties have been narrowed down to three: (1) the Chamberger account, on which defendant concedes that a balance of \$76 is due, and on which the court allowed \$165, the whole amount claimed by plaintiff in that respect. Defendant admits that plaintiff, in fact, rendered the service of procuring Chamberger as a customer and the amount of goods sold on that account is not in dispute, but defendant contends that the account should be designated as "a wholesale account," on which a commission of only 25 cents a case, instead of 50 cents (as plaintiff contends) is payable. The precise difference between a wholesale account and a retail account cannot be ascertained from the evidence. At any rate, plaintiff testifies that any such reduction in the amount of commissions he was to receive upon sales of this kind was never called to his attention prior to the time he obtained the customer. The burden of proof was upon defendant, as the undisputed evidence shows that 50 cents per case was the commission originally agreed upon, and the undisputed evidence also shows that plaintiff was employed by the manager of the retail department and worked under his direction. Such being the fact and the finding of the court

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on this point being entitled to the same weight in this court as the verdict of a jury, we would not be justified in entering a finding contrary to that of the trial court as to this item.

The second item in dispute between the parties concerns the amount of commissions, if any, due plaintiff on account of sales made to one Sam Mirsh, who was doing business as the United Brew Distributors. Here also the court allowed the full amount claimed by plaintiff. The defense urged as to this item is that Mirsh was a customer of defendant before plaintiff was employed, and evidence was offered tending to show that defendant had, in fact, contracted for the sale of the goods in question to the customer prior to the time plaintiff was employed and called upon him.

Sam Mirsh ran a tavern known as the Lincoln Grill. Plaintiff says he called on Sam about November 7, 1933, and asked him to come to defendant's office, such being his instructions as a salesman from the head of the department; that Mirsh said he would do so the next day; that he did not come that day but did come the day after he said he would be there; that in his presence Mirsh talked with Mulcahy, the president's assistant. Plaintiff says, "I did not see him at first and he told Mr. Mulcahy I was the man that went over to see him the other time."

Plaintiff produced an identified and unsigned order, which he says he wrote in triplicate at this time. Defendant contends that it should not have been admitted in evidence. It is dated November 10, 1933, and is as follows:

"Sam Mirsh
4643 Lincoln Ave
to be specified
Liquor and Spirits as
specified

order turned in to Mulcahy
150.00"

Jesus Bibble

Plaintiff says that a copy of this order was left by him with Mulcahy that a day or two afterward he learned that Joseph Mirsh, manager of

on this point being entitled to the same weight in this court as the
 verdict of a jury, we could not so hastily in connection a finding
 contrary to that of the trial court as to this issue.

The second issue in dispute between the parties concerned the
 amount of commission, if any, the plaintiff was entitled to collect with
 to one Sam Dixon, who was being sentenced at the United States District
 Court. Here also the court found the bill amounting to \$100.00
 plaintiff. The defense urged as to this issue in that Dixon was a
 customer of defendant before plaintiff was employed, and therefore
 was entitled to the same rate of interest as a loan, and that
 for the sake of the good in question to the business of the
 firm plaintiff was employed and called upon him.

The third issue was a further branch of the second issue. It
 was urged by the defense on this point November 7, 1933, and asked him to
 return to defendant's office, upon being his instructions as a referee
 was then the head of the department; that Dixon said he would do as
 the court said; that he did not want to go to the office and see
 after it and he would be there; that he did not want to go to the
 office, the president's assistant, plaintiff says, "I did not
 see him at that time and he said Mr. Murphy I was the one that went
 over in the day time."

Plaintiff produced an identified and undoubted order, which
 he says he wrote in recognition of this case, defendant contends
 that it should not have been admitted in evidence, it is dated
 November 13, 1933, and is as follows:

"Sam Dixon
 Dear Sir:
 It is requested
 that you please
 pay to the order of
 plaintiff \$100.00
 immediately."

Very truly yours,
 Plaintiff

Sam Dixon

Plaintiff says that on May 14, 1934, when Sam Dixon was told by his wife to
 take a trip to New Orleans he carried with him \$100.00, which he

the wholesale department, came up to Mulcahy and said he knew the customer and signed him up without asking about this copy of the order left with Mulcahy.

Joseph Hirsh testified that he contacted Sam Hirsh as early as September; that while he was with the Burnham Distilling Co., Sam Hirsh called him up and said that "if I wanted to continue handling the liquor he would place the order with me." The witness further testified: "He did not give me an order in October. The next time I saw him was in November at the Oscar Nelson Company. At that time he gave me an order for \$24,000. This was the first order the Oscar Nelson Company had from him. He gave the order as the United Brew Distributors." He further says that he turned down plaintiff's order because the firm's rule was that it did not accept orders for less than 250 cases and a deposit of \$500. He positively testified to the effect that he already had an order from Sam Hirsh when plaintiff came in and that the original order was taken the first or second of November, but defendant failed to produce any such order, and an examination of the original record leaves the testimony of Joseph Hirsh under grave suspicion.

Mulcahy, in whom the uncontradicted evidence shows plaintiff directed this customer, was not produced as a witness, and plaintiff's narration of his dealings in this respect with Mulcahy is therefore undisputed on the record. Here, again, we must remember the weight due the finding of the trial court who saw and heard the witnesses, and we cannot say that his finding is clearly and manifestly wrong.

More closely contested is the third item, namely, the claim for commissions on sales made to Hillman's (Stop and Shop) amounting to \$313.80, which the court allowed. The testimony of plaintiff is to the effect that about November 10th he called on a Mr. Remis, the purchaser for Hillman's, and discussed the liquor situation with

The witness testified that he was in the room at the time the witness was killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed.

Joseph Smith testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed.

At that time he was in the room and he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed.

Smith testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed.

Smith testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed. The witness testified that he saw the witness being killed and that he saw the witness being killed.

him; that Remis said if plaintiff would make a list of the items and get him the prices, he would appreciate it; that he took that back to the office and Ripple sent him to Sulcahy, and that they said they would give him the price in a day or so; that on the following morning, Mr. Colan, the president, called plaintiff and five other men into his office and told them he was going to appoint them the six "key-men" in the loop. Plaintiff says Mr. Colan told him at that time that the salesmen should not be walking over each other; that Remis had told him that two salesmen had been there that morning. This other salesman was a Mr. Cleary, who, plaintiff says, was present at the time, and further that Cleary said that as long as plaintiff had brought back the request for prices he would step out. Plaintiff further says that Colan then said they had "an in" at Hillman's through Sabath, Hillman's attorney, but that he, Colan would help plaintiff get the order, and that when plaintiff was ready for the prices he would go along with him to Hillman's so that "we would get an order from them." Plaintiff says that Colan said at that time there would be no commissions or sales credited to anybody other than the salesmen, that there would be no house accounts and that included all the officers and persons working there, and also Sulcahy. Plaintiff says he never went to Hillman's with Mr. Colan because Mr. Colan never told him ^{when} to go with him, and that he first knew the order was received when he saw it on Oscar Nelson's desk a few days afterward. Plaintiff never received the price list nor any order from Mr. Remis or from anyone else in the Hillman's organization. Plaintiff says, however, that Mr. Remis gave him a list of different liquors on which he wished to know the specific prices. Plaintiff also says that Mr. Ripple told him to wait with reference to the Hillman order and not to call on any of the big accounts for two or three days.

Patten, also a salesman, corroborates plaintiff as to the

him; that he said it was a list of the names
and got him the names, he would appreciate it; that he had then
back to the office and he said he was sorry, and that they
said they would give him the list in a few days; that he had then
having received Mr. Jones. The president, called him and told
about his list and said that he was going to a point
then the list "agreed" to the list. President said that
him at that time that the names were not the names they were
about; that he said that the two names were not the names they
wanted. This name was not a list, it was a list, it was a list,
and present of the list, and President said that he had
as President had brought back the names for others to read them
was. President said that he had then said that he had
at the time of the list, it was a list, it was a list, it was a list,
would help President for the list, and that was President's list
for the list he would be about the list to the list he had the
well as the list. President said that he had the list
that the list would be no longer on the list to be read
about the list, that there would be no more names and
that included all the names and names were read, and then
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President. When the list was read, it was a list, it was a list,
that the list was read, it was a list, it was a list, it was a list,
a few days ago. President said that he had the list and
that the list was read, it was a list, it was a list, it was a list,
President. President said, however, that he had the list and
list of different names on which he asked to know the names
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original contract and says he was one of the six men present at the office of the president of the company in November; that at that time Bibble and Cleary stated they had been to Hillman's and that Cleary told plaintiff, in the presence of Golan, to go ahead and work on the account; that Golan told plaintiff "to lay off the accounts until we are ready to get the business, and when we are ready he would go over with Mr. Bibble and get the order together." He also says that Golan said there would be no house accounts and that some salesman would get credit for every bit of business that came into the house; that Golan said the house did not want what was known as "house business."

Golan testifies that he remembered the meeting of "key-men" in his office between the latter part of November and December 6th; that Ripole, Bibble, Weinfeld and three other salesmen were present; that the meeting had been called to inform the salesmen that all sales would be credited to those who brought in the actual order with the signature affixed; that he told plaintiff that prior to defendant's final organization certain accounts had been contacted; that plaintiff mentioned the Hillman account but that he told plaintiff that Mr. Savage, a friend of Golan's and attorney for Hillman's, had arranged a contract for him (Golan) with Mr. Leeb, Jr., and that Remis and the witness had already signed a contract with Hillman's, and that he told plaintiff and others to stay away from there because defendant had a contract. This order from Hillman's is in the record as defendant's exhibit "1." It is dated November 7, 1933, and recites in substance that in view of Golan's statement that defendant would have an adequate supply of Schenley Products Co. liquor to deliver to the buyer from Chicago stock, and further that defendant would guarantee the prices for a period of 30 days, "we wish you would please enter our order as follows," following which are orders for specific amounts of Golden Wedding Bourbon, Golden

[illegible]

Wedding Rye, Gibson Rye, and other liquors. The writing concludes: "All of the above prices are subject to a cash discount of 1 1/4% for payment to be made by us the same day the goods are received by us." The writing is executed for Hillman's by A. A. Loeb, treasurer, and accepted by Louis E. Golan.

Mr. Hemia testifies that he was the buyer for Hillman's; that he was there when the letter was dictated, but he does not remember whether it was signed in his presence, and he does not remember the date; he says he gave the order to defendant through Golan, who was there with Oscar Nelson; that after he had given the order ten or fifteen men from defendant called on him, and plaintiff was one of the men who called; that he did not give him an order but gave the order to defendant because Mr. Loeb and Mr. Savage were friends and because the Hemenley Co. refused to sell to Hillman's direct. He says Mr. Loeb had talked to him about buying from the Oscar Nelson Co. a long time before; that "I don't remember what conversation I had with Mr. Dibble." He does not directly contradict the testimony of plaintiff.

Mr. Hipple says that at the meeting of the salesmen at Golan's office, Golan said "to lay off the Hillman account and he would take care of it," but that he didn't say anything about commissions, or who was to get credit for the order at Hillman's, and that nothing was said there as to whether a salesman had to turn in an order, or whether the names protected him. He says he told the salesmen the only way he could determine who was to continue with defendant in the future would be by counting the orders, and that the men who brought in the orders would be the men who would receive the commissions; that he directed the men to turn in a list of all their prospects; that he found out some of them had taken the telephone book and had made out the names; that no one received commissions on orders not shipped or on orders sent out and not returned.

Joseph Weinfeld, one of the six "key-men" present at Golan's office, says that he remembers only that they were told to go out and get business, that it was a big opportunity and the commissions were to be 50 cents a case. He was called as a witness by defendant.

Plaintiff in rebuttal testified, denying Mr. Golan's statements to the effect that he had been told not to call on Hillman's and others. Here, again, the issue between these parties seems to be one of fact. The testimony of Golan is contradicted by plaintiff, by Hipple, by Weinfeld, and, significantly, Neale does not contradict the narration as given by plaintiff of his contact with him. Whether the writing in evidence was actually made upon the date appearing on it is left exceedingly doubtful. The entire evidence is conflicting to a high degree, and the situation presented by the record is one where the Appellate Tribunal must rely upon the findings of the trial court. If the contract, in fact, had been that plaintiff was obligated to be the procuring cause of the sales, the issue of fact would be in doubt; but it is clear from all the evidence that this was not the agreement. It is unfortunate that the terms of the arrangement under which defendant worked should have been left at all doubtful; however, the trial court saw and heard the witnesses and the record before us would not justify a reversal of the judgment. It is therefore affirmed.

AFFIRMED.

O'Connor, S. J., concurs.

McSurely, J., dissenting: In my opinion plaintiff is not entitled to commissions on the sales to Hillman's and Hirsch.

[illegible]

37771

D. D. BELL,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,
Appellant.

65
APPEAL FROM MEDICAL COURT

OF CHICAGO

279 I.A. 629¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant has appealed from a judgment in favor of plaintiff in the sum of \$899.22 entered upon the finding of the court.

The statement of claim averred that on October 16, 1933, plaintiff rented from defendant, through its agent, garage No. 4 on the premises known as 6835-7 Merrill avenue; that the agreement was oral and to the effect that plaintiff should have the garage on the same terms as he had rented it in former years from the then owner. Some of the terms were that the rental should be five dollars a month and that the garage should be heated during the cold weather. The statement of claim alleged that defendant neglected to heat the garage as agreed and that as a result the water in the radiator of plaintiff's automobile froze November 16, 1933, cracking the cylinder box, etc.

The affidavit of merits denied that plaintiff was to have the garage on the same terms as from the former owner and denied that defendant agreed the garage should be heated during the cold weather. As to the damage alleged, defendant demanded strict proof.

Defendant contends (assuming an agreement to heat the premises) that plaintiff cannot recover on account of contributory negligence; that plaintiff failed to prove by a preponderance of the evidence that the agreement provided that heat should be furnished, and that the proofs do not justify the award of damages allowed.

There was proof tending to show that the garage in question was one of six located in the rear of the premises known as 6835 Merrill avenue, which were also improved by an apartment building;

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100

that the former owner of this building was a Mrs. Purcell, from whom plaintiff first leased this garage No. 4. Albert J. Bates, Jr., brother-in-law of plaintiff, was the lessee of the first apartment of the building and arrangements were made later by which he also leased this garage from Mrs. Purcell and permitted plaintiff to occupy it under a sub-lease during the season of 1932 to 1933. There was a heating plant designed and used for the purpose of furnishing heat to all the six garages, and the evidence indicates that heat was furnished during 1932 to 1933. Some time during that year (defendant's evidence indicates in February) some of the mechanism of the plant was broken. It was not thereafter repaired.

On October 16, 1933, plaintiff through a Mr. Kane in the offices of Glatt & Price, real estate agents, made an oral agreement for a lease of garage No. 4. The terms of the lease are in dispute. Plaintiff continued in possession. His testimony is to the effect that he last drove his automobile (which was a 1930 LaSalle Town Sedan) during the first week of November, 1933, and that it was in good condition at that time. He placed the automobile in the garage at that time and saw it next on November 16, 1933. He then got into the car and tried to start it. It would not go. Upon examination he found that there was a hole in the side of the cylinder ~~was~~ about four inches long and three inches high. The plug, or core, at the end of the cylinder was, he says, "popped out with ice behind it." The cylinder head had two big cracks and was warped out of shape. There was ice on the inside of the radiator. Mr. Bates (plaintiff's brother-in-law) and plaintiff put an electric heater under the hood of the car. Plaintiff says that the janitor Mr. Thunstrom, came out. When questioned as to why he hadn't turned on the heat, the janitor replied that he had orders not to do so. Mr. Bates then towed the car to a garage on Cornell avenue

that the former owner of this building was a man, possibly, 1930
and plaintiff first leased this garage to A. Albert A. Albert
Jr., brother-in-law of plaintiff, and the lease on the first
agreement of the building and improvements were made later by
which he also leased this garage from Mrs. Albert and plaintiff
plaintiff to occupy it under a sub-lease during the summer of 1933
to 1935. There was a meeting of mind designed and made for the pur-
pose of obtaining rent for all the six garages, and the evidence
indicates that rent was received during 1933 to 1935. Some time
during that year (defendant's witness indicated in testimony) some
of the mechanics of the plant was broken. It was not repaired
repaired.

In October 1935, plaintiff through a son, went to the
office of Albert A. Albert, Jr., and there was a meeting
held for a purpose of getting the A. The terms of the lease are in
dispute. Plaintiff contended in possession. The defendant is to
the effect that he had given him sublease (which was a lease for
three years) during the time when at defendant, 1933, and
that it was in fact cancelled at that time, and placed the sub-
lease in the garage at that time and now it says he received it, 1935.
He then got into the car and tried to start it. It would not go.
Then defendant he found that there was a nail in the side of the
engine. Now says that there was a nail in the engine side.

Next, at court, at the end of the plaintiff was, he says, "he said and
with his hands in." The witness said that two big screws and was
wrenched out of shape. There was also on the inside of the radiator.
He, before plaintiff's first witness-in-law, and plaintiff had an account
together with the head of the car. Plaintiff says that the plaintiff
Mr. defendant, came out. Then questioned as to why he hadn't
looked at the head, the plaintiff replied that he had orders not to
do so. He, then turned the car to a garage on Garfield Avenue

near 55th street. Plaintiff says he saw the car again May 5, 1934, and that it was then in the same condition that it was November 10, 1933. On that date, namely, May 5th, he had a mechanic inspect the car and give him an estimate as to the cost of repair. There was evidence for plaintiff tending to show that the reasonable cost of repairing the car would be \$340. Another mechanic called by defendant testified to a less sum. The court based its finding of damages on the testimony of defendant's witness. There was also testimony tending to show that the heating plant could have been repaired at an expense of \$5 or \$7.50.

The contention that plaintiff is barred by contributory negligence is based upon the theory that he should have placed some anti-freezing fluid, such as prestone, or alcohol, in the radiator. It is said this would have prevented the freezing. Mr. Erickl, a witness for plaintiff and estimator for the Cadillac Motor Car Company, who had been in that line of business for fifteen years, examined the car May 5th and testified that its condition was due to the fact that the water in it became frozen, and that this condition occurred because there was no anti-freeze solution in the radiator of the car. He said if the proper amount of anti-freeze solution had been in the radiator the damage would not have occurred.

Mr. McLaughlin (also a witness for plaintiff) who was a tenant in the third apartment at 6935 Merrill avenue and who kept his Chevrolet car in one of the garages, testified that he kept anti-freeze solution in the radiator of his car while it was in the garage but that the car froze, he thought because he did not have enough of the solution in the radiator.

Under all the facts we are of the opinion that the defence of contributory negligence was not available to defendant. Plaintiff's action is based upon a contract. He offered evidence tending to show (and the court found) that at the time he arranged to lease

the garage from defendant he contracted that heat should be furnished. The undisputed evidence is that he was not at this particular time driving the automobile. He left it in the garage. Assuming that he had made a contract with defendant to furnish heat, we hold he had a right to rely on this contract, and under such circumstances was not negligent in failing to make use of an anti-freeze solution, which otherwise might have been necessary. If defendant promised to heat the garage, plaintiff had a right to rely on the promise. He could not be held negligent on account of such reliance.

The controlling question in the case therefore turns upon the question as to what were the terms of the oral arrangement made with defendant's agent for leasing the garage. That arrangement was made at the offices of Glatt & Price with Mr. Emsc. Plaintiff testified that he talked with Mr. Emsc on October 16, 1935, and told him that he had been paying five dollars a month for the garage heated and that he understood that he was to have the garage on the same conditions as he had it the previous year; that Mr. Emsc replied, "Yes, except that we want it on a month to month basis." Plaintiff then paid him a month's rent, \$5, and was given a receipt which is in evidence. It is on the stationery of Glatt & Price. It contains no reference to whether the garage was to be heated or unheated. The trial Judge thought that under all the circumstances the absence of any contrary notation on the receipt indicated heat was to be furnished.

Mr. Emsc, on the contrary, says that in this conversation of October 16th plaintiff brought up the question of heat and he told plaintiff that it would be physically impossible to put heat in at five dollars a month. He says he went into detail, explaining that if he did heat the garage a dollar of the money each month would go to the janitor, according to the Union rule, and that would leave only four dollars to pay for the garage and heat. He says plaintiff

the matter from the fact that the Government had been informed by the
the suggested evidence in that he was not at the time of the
during the interview. We told it in the report. In addition, we
he had made a contract with someone to obtain work, we told it
and a right to rely on this contract, and that this information
was not required in order to make use of an anti-trust statute,
which otherwise might have been necessary. It is not possible to
meet the Government, which had a right to rely on the evidence, to
show that he was not at the time of the interview.

[illegible]

only four dollars to pay for the garage had been. He says Plaintiff
to the janitor, according to the Union rule, and that would leave
it be the next day Garage a failure of the money even more would be
five dollars a month. It says he went into details, explaining that
Plaintiff said it would be physically impossible for him to do so
October 1938 Plaintiff stated as the question of rent was his job

Mr. Jones, on the contrary, says that in such investigation of

accepted the garage under those conditions. These statements are denied by plaintiff.

Mr. McLaughlin and Mr. Bates both gave evidence tending to show that the garage rented at \$5 a month when Mrs. Purcell owned the premises and that heat was furnished by her. They also testified that their agreements with defendant were to the effect that heat should be furnished to their similar garages for \$5 a month. The lease from Mrs. Purcell to Mr. Bates is in evidence and indicates she was to furnish heat for the garages.

The court saw and heard the witnesses, and it is unnecessary to cite authorities to the effect that the finding of the trial judge under such circumstances is entitled to the same weight as the verdict of a jury. Hankins v. Colley, 106 Ill. App. 522; Frederick v. O'Leary, 112 Ill. App. 658; Lidgerwood Mfg. Co. v. S. W. H. Robinson & Son Contracting Co., 198 Ill. App. 604; Ill. Indiana Fair Ass'n v. Phillips, 241 Ill. App. 454. Neither as to this controlling issue in the case nor as to the amount of damages allowed can we say that the finding of the court is clearly and manifestly against the evidence. The controlling issues are of fact, and these are settled by the finding of the court.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

decided by majority.

where the case is pending and the court.

The court may also make the necessary, and it is necessary

to the satisfaction of the court that the finding of fact shall

be made upon the evidence in the case and not upon any other

the finding of fact. The court may also make the necessary

investigation of the facts and the court may also make the

necessary investigation of the facts and the court may also make the

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The judgment is hereby affirmed.

WITNESSES,

Attorney at Law, New York, N.Y.

37799

EMMA WELCH,
Appellant,

vs.

THOMAS A. WALPOLE, as Administrator
of the Estate of EMMA SWIGART,
Deceased, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 629²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Charles F. Swigart died at Chicago October 17, 1917, intestate. He left an estate estimated to be worth more than \$400,000. Plaintiff claims she is his only heir at law and next of kin. Her claims in that respect have been litigated in the Probate court of Cook county, upon appeal from that court in the Circuit court of Cook county, upon appeal from the Circuit court in the Appellate court, and the decisions of all these courts have been reviewed in the Supreme court. Worsley v. Welch, 317 Ill. 90; Worsley v. Welch, 239 Ill. App. 658; Welch v. Worsley, 330 Ill. 172. The judgment upon the trial in the Circuit court was in favor of complainant; in all other courts the judgment has been adverse to her contentions.

Pursuant to the mandate of the Supreme court a decree was entered against her in the Circuit court. May 8, 1934, she filed her bill in chancery in the nature of a bill of review, praying that the decree of the Circuit court rendered pursuant to the mandate of the Supreme court should be reviewed, set aside and held for naught, and that she be decreed to be the sole heir of Charles F. Swigart, and that his estate be decreed to be hers by inheritance. She made defendant to her bill Thomas A. Walpole, administrator of the estate of Emma Swigart, deceased, who by the Supreme court decision was found to be Charles F. Swigart's only heir at law and next of kin. She also made defendants to the bill numerous persons, who since the decease of Emma Swigart have been found to be her heirs at law and next of kin.

The administrator and certain heirs of Emma Swigert moved to strike the complaint for insufficiency and other reasons stated in their motions. The motions were sustained, and on July 12, 1934, the Circuit court entered a decree dismissing the bill of complaint for want of equity. From that decree plaintiff has prosecuted this appeal.

The substantial averments of the bill are that the decisions of this court and of the Supreme court were brought about by a conspiracy of persons named who produced perjured testimony on the hearing in the Circuit court, and that the final decree was based on such false testimony. It is not averred that any one has been indicted or convicted by reason of such alleged perjured testimony.

While there are expressions to the contrary, in such cases in Illinois the rule is that equity will not set aside a decree merely upon the ground that it was obtained by false evidence given in the course of a trial, but only for fraud, which gives the court only colorable jurisdiction. It is quite unnecessary to discuss the decisions in detail. People v. Sterling, 357 Ill. 354, (where the earlier cases of Caswell v. Caswell, 120 Ill. 377; Burton v. Perry, 146 Ill. 71; Syana v. Woodsworth, 313 Ill. 404; Beck v. Lash, 303 Ill. 549; Youtch v. Kempel, 332 Ill. 192; Greene v. Greene, 2 Gray 361, and many similar cases from other jurisdictions declare this rule.) The decisions of the Appellate courts are to the same effect. Guthrie v. Doud, 33 Ill. App. 68; Scanlan v. Scanlan, 41 Ill. App. 449; Ringman v. Ringman, 61 Ill. App. 134; Adamski v. Wiczorek, 93 Ill. App. 357; Johnson v. Anna Elkg. & Loan Assoc., 133 Ill. App. 213; McKasney v. Chicago, 194 Ill. App. 839; Hints v. Moldenhauer, 343 Ill. App. 227.

The authorities are overwhelming, although apparently two or three earlier Appellate court cases are to the contrary. Sargent Co. v. Hamblis, 127 Ill. App. 531; McNally v. Regan, 185 Ill. App.

The principal and certain other of these persons were
to settle the accounts for the property and other matters relating
in their relations. The accounts were examined, and on July 12, 1893,
the Illinois court entered a decree dissolving the firm of Campbell
for want of equity. From that decree Campbell has prosecuted this
appeal.

The substantial grounds of the bill are that the decision
of this court and of the Supreme court were founded upon a mis-
take of persons named who produced pertinent testimony on the
hearing in the Illinois court, and that the final decree was based on
such false testimony. It is not averred that any one has been im-
peached or convicted by reason of such alleged perjured testimony.
While there are exceptions in the contrary, in such cases

in Illinois the rule is that equity will not set aside a decree
where the ground that it was obtained by false evidence is shown
in the course of a trial, but only for fraud, which gives the court
only equitable jurisdiction. It is quite unnecessary to discuss
the doctrine in detail. See Smith v. Smith, 127 Ill. 324, 17 Ill. 324.
The cases of Smith v. Smith, 127 Ill. 324, 17 Ill. 324; Smith v. Smith,
127 Ill. 324, 17 Ill. 324; Woodworth v. Woodworth, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324; and many other cases from other jurisdictions sustain
this rule. The decision of the appellate courts are to the same
effect. Smith v. Smith, 127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324;
127 Ill. 324, 17 Ill. 324.

The authorities are overwhelming against Campbell. The
of these courts for appellate courts agree are to the contrary. Smith v. Smith,
127 Ill. 324, 17 Ill. 324; Smith v. Smith, 127 Ill. 324, 17 Ill. 324.

424, opinion abstracted.

In People v. Sterling, 357 Ill. 354, our Supreme court quotes with approval this statement of the reason for this rule of law in Greene v. Greene, 2 Gray 361:

"But if a new and original libel may be brought upon the ground that a former decree was obtained by false evidence, we see nothing to prevent the husband from bringing a third suit to reverse the decree of reversal on a suggestion and offer of proof that the decree of reversal was obtained on perjury, subornation of perjury and other fraud, and thus reverse the second decree and re-instate the original decree of divorce a vinculo."

Our Supreme court opinion continues:

"In considering this point it must be borne in mind that there are two classes of frauds drawn in question in cases of this kind: First, there is that kind of fraud which prevents the court from acquiring jurisdiction or merely gives it colorable jurisdiction; and second, that kind of fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment, and other chicanery. The first variety of fraud will invalidate the decree, rendering it an entire nullity. On the other hand, it is well established that the second class has no such legal effect."

Moreover, there is force in the contention of defendants that plaintiff does not state facts bringing her cause within the rule (for which she contends) in states where it is recognized.

Baring v. Ott, 138 Wis. 260. This bill does not allege that anyone has been convicted of perjury, nor, indeed, does it appear that anyone has been prosecuted for the alleged conspiracy to commit perjury, on which the bill is based. Neither are there averments that documentary or other evidence can be produced that will establish the case stated in the bill beyond a reasonable doubt. Plaintiff could not succeed on her bill even in states where the rule is different from that announced by the courts of Illinois. Baring v. Ott, 138 Wis. 260.

We also think there is merit to the contention that plaintiff's bill was subject to demurrer, because she did not set up facts excusing laches, which was apparent upon the face of her bill. Her petition was filed in the Probate court August 29, 1922. Her

decree in the Circuit court was entered May 30, 1924. On April 21, 1928, the Supreme court affirmed the order of the appellate court reversing the order of the Circuit court and finding that plaintiff was not the heir of Swigart. Her bill in this case was filed May 8, 1934, - more than six years after the final order of the Supreme court. Defendants contend that a bill of this kind must be brought within the time limited for suing out a writ of error, and it would seem not unreasonable to apply such rule. If that rule is regarded as applicable, plaintiff would appear to be too late, in the absence of averments in her bill excusing her laches. That such is the rule on bills of review is held in Galg v. Littledale, 184 Ill. 530; Lewis v. Topsyee, 301 Ill. 320; Evans v. Woodsworth, 213 Ill. 404; French v. Thomas, 258 Ill. 65; Schoknecht v. Praggas, 320 Ill. 423.

Aside from any decisions of the courts announcing technical rules of law, we think the principles that a person should not twice be vexed by litigation concerning the same matter and that the public interest requires finality in decrees and judgments of the courts demand that the order entered here should be affirmed. The parties most strongly accused are dead. Plaintiff does not allege when the facts with reference to this alleged conspiracy to give false testimony first came to her knowledge. In the nature of the case, if the evidence was false, she must have known it at the time of the trial in the Circuit court. We do not need to hold that in no possible case will a bill lie to set aside a judgment or decree based on perjury in order to reach the conclusion that this bill was properly dismissed.

We have examined the opinion of this court and the opinion of the Supreme court in this matter, and the examination discloses that the controlling evidence in the case consisted of written documents, which plaintiff did not then deny to be true and which

[illegible]

she does not deny now or ever to be fabricated. The oral evidence too seems to have been overwhelming. The filing of this bill is unjustifiable.

The decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McGuire, J., concur.

not 1944 but 1945 and it was in 1945 that the first edition
was known to have been published. The edition of 1945 is

referred to.

The edition is referred to.

1945.

1945, 1946 and 1947.

37861

BLACKSTONE SHOP, Inc.,
a Corporation,

Appellant,

vs.

JESSICA E. LASHER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 629³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for the sum of \$325 claimed to be due for remodeling and re-blending a mink coat as per agreement. The affidavit of merits averred that the work was not done, as agreed, in a manner satisfactory to defendant but, on the contrary, in a negligent, defective and unworkmanlike manner, whereby the value of the coat was reduced more than the amount claimed by plaintiff.

Defendant also filed a statement by way of counter-claim in which she averred that the coat when delivered to plaintiff on or about May 5, 1933, was of the value of \$1800, and that by reason of the negligent manner in which plaintiff did the work the value of the coat when returned November 18, 1933, was diminished to about \$375, wherefore she claimed damages to the amount of \$825. Plaintiff replied, denying all of the material averments in the statement of counter-claim. The cause was tried by the court, and there was a finding against plaintiff on its claim and a finding in favor of defendant on her counter-claim, with damages assessed at \$400, for which amount judgment was entered against plaintiff and in favor of defendant.

The evidence tends to show that defendant purchased the coat in Paris for \$2500 about six years before the time she delivered it to plaintiff for re-styling and re-blending May 5, 1933. It appears that the coat had once before, in 1931, been re-styled by Mr. Necht, a furrier. The evidence also tends to show that immediately after the re-delivery of the coat to defendant by plaintiff November 18,

37202

ALBANY, N.Y.,
JANUARY 1, 1933.

TO:

THE ALBANY
OFFICE.

ALBANY, N.Y.,

TO THE

279 I.A. 629

ALBANY, N.Y.,

Plaintiff's name for the sum of \$100.00 claimed to be due for
remodeling and re-tiling work done at the residence of the
defendant, on the basis of a verbal agreement, the
defendant's refusal to pay the same, and the fact that the
defendant's refusal to pay the same is in violation of the
terms of the agreement, and the fact that the defendant's
refusal to pay the same is in violation of the terms of the
agreement, and the fact that the defendant's refusal to pay
the same is in violation of the terms of the agreement.

Defendant also filed a statement by way of counterclaim in
which she averred that the work was delivered to plaintiff on or
about May 1, 1932, and of the value of \$100.00, and that by reason of

the plaintiff's refusal to pay the same, the plaintiff has been
the cost of the work done, and the cost of the work done is
\$100.00, and the cost of the work done is \$100.00.

This matter was referred to the referee in the amount of \$100.00.
The referee has found in favor of the plaintiff in the amount of
\$100.00, and the referee has found in favor of the plaintiff in
the amount of \$100.00.

The referee has found in favor of the plaintiff in the amount of
\$100.00, and the referee has found in favor of the plaintiff in
the amount of \$100.00.

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the amount of \$100.00.

The referee has found in favor of the plaintiff in the amount of
\$100.00, and the referee has found in favor of the plaintiff in
the amount of \$100.00.

1933, defendant wrote plaintiff making bitter complaint about the way the work was done, saying that the coat was in an unsatisfactory condition and pointing out the particular respects in which the work was unskillfully done. She wrote that plaintiff had had every opportunity to make the coat right, and that, as she told plaintiff at the last fitting, she would not come in to be fitted again. She advised plaintiff that she proposed to take the coat to a reputable furrier at a first-class store, and that she would deduct the cost when "I pay your bill."

The record does not disclose any reply by plaintiff to this letter, other than the mailing of a statement to defendant for \$325, the amount claimed to be due. December 29, 1933, Mrs. Lasher replied to this statement that she would not pay because the damage done to her coat was more than \$325. She said further that she had tried to have the coat fixed elsewhere but found first-class furriers unwilling to undertake the job; and said she felt she had a claim against plaintiff for at least \$750.

On the trial Mrs. Lasher testified at length about the transaction. She said she took the coat back after it was delivered and showed it to Miss Korshak of plaintiff's house and told her that it was "terrible;" that Miss Korshak said she couldn't see anything wrong with it; that she then took the coat to a reputable store and after they refused to take the responsibility of doing anything with it because it was in such bad shape, she saw Miss Korshak and told her that she wanted her "to make good;" that Miss Korshak proposed to sell her a new coat and allow her something on it for the old one.

Defendant first took the coat to plaintiff's establishment because she knew a Miss McCarthy who worked there. Her conversation with respect to re-styling the coat was with a Mr. Irwin, who, she says, showed her a very lovely coat and said that her coat

would look exactly like it. Miss Korshak came in and at the same time said it would be very lovely and would look like a new coat. Later when she took up the matter of fitting the coat, it seems both Miss McCarthy and Mr. Irwin had severed their connection with plaintiff's house.

It was also disclosed by Mrs. Lasher's testimony that some time after she received the coat in November, 1933, she sold it through another dealer to a Mrs. Carrier, realizing \$30.00 net for it. She did not give any notice to plaintiff of her intention to make this sale, and plaintiff was apparently not informed of the fact until Mrs. Lasher so testified. Mrs. Carrier was not called as a witness, and the coat itself was not produced upon the trial. However, Mrs. Lasher testified not only as to her leaving the coat at plaintiff's place of business but also as to many visits there for the purpose of having the coat properly restyled and refitted. She also testified with reference to the defects in the coat before and after it was returned to her. She said the coat was positively too small for her; that she told Miss Korshak that it was "atrocious," and that Miss Korshak agreed that it was "unbecoming." She said the coat was double-lined inside and stuck out as if she "weighed a ton;" that the collar was very thick, and that Miss Korshak suggested making over the coat as the style was very old-fashioned. She also said she kept asking for Mr. Irwin; that he was to have superintended the work, and that it would have been all right if he had done it.

Neither Miss Korshak nor any of the employees of plaintiff other than Mr. Klink, general manager and fur buyer of the Blackstone Shop, was called as a witness. Mr. Klink (perhaps inadvertently) failed to testify that the work on the coat was skillfully done.

We think there was evidence from which the court might reasonably find that the workmanship was done negligently. Plaintiff

argues, however, that the sale of the coat by defendant as restyled constituted an irrevocable election to accept the coat and was a waiver of all defects. It cites to this point section 40 of the Sales Act (Cahill's Ill. Rev. Stat., Chap. 121a, sec. 40). It also cites and quotes at length from cases such as America Theatre Co. v. Siegel Scaer & Co., 221 Ill. 745; Fred W. Wolf Co. v. Research Refrigerating Co., 252 Ill. 471; Hommel Tins Co. v. Seiler, 197 Ill. App. 382; Foley & Co. v. Engelstorf Stone & Mfg. Co., 263 Ill. App. 78; Hall v. Bergensneider, 263 Ill. App. 118. These cases (announcing well recognized rules in the law of sales) are inapplicable to a transaction such as this, which was a bailment "locatio operis faciendi," - that is, a bailment where work and labor were to be performed upon the thing delivered to the bailee. In such transactions, even in the absence of an express contract, there is an implied agreement that the thing altered or repaired shall be reasonably fit for the purpose intended, or capable of the use for which it is designed in case the bailee had knowledge of such purpose or use. The rule in such case is that the bailee is required to exercise ordinary care in the performance of the service he agrees to do in relation to the thing bailed, and this requires that he use such skill and care as an ordinarily skilful workman, competent to do his work, would use in such a case. The coat belonged to Mrs. Lusher, and she did not, by accepting and keeping the coat or by selling it, waive any of her rights with respect to the contract she entered into with plaintiff. These rules are laid down in the well considered case of Bouglass v. Hart, 103 Conn. 635, 131 Atl. 401, 44 A.L.R. 820.

We think there was evidence from which the court might reasonably find that plaintiff failed to comply with the terms of its contract and that the finding in favor of defendant, so far as the claim for services in remodeling and reblending the coat was

concerned, was justified by the evidence. That finding of the court is here entitled to the same weight as the verdict of a jury. We cannot say that it is clearly and manifestly against the weight of the evidence. The judgment therefore against plaintiff and in favor of defendant upon the original claim must be affirmed.

As to plaintiff's claim, the burden of proof was on plaintiff to establish it by a preponderance of the evidence. As to the counter-claim, the burden was upon defendant to establish that the coat was damaged to the amount for which judgment was entered. The evidence on that issue is very indefinite. After the court announced its ruling upon plaintiff's claim defendant indicated a desire to take a non-suit as to the counter-claim, but plaintiff objected. The reason for the objection is not quite clear, but the evidence submitted in regard to the value of the coat was indefinite and uncertain. Mrs. Lasher stated she paid \$2500 for the coat in Paris and that she owned it between six and seven years. Mr. Hecht, a furrier who remodeled it in 1931, testified that it would depreciate in value about ten per cent each year. A receipt apparently given to Mrs. Lasher at the time she delivered the coat to plaintiff May 6, 1935, states the value of it to be \$325. Mrs. Lasher testified that plaintiff's manager suggested to her that she should have it insured for \$1,000. The only evidence in the record tending to show the value of the coat after it was delivered November 18, 1935, is the fact of its sale to Mrs. Currier for \$375. That transaction, however, has few of the qualities courts require of a sale in order that it may be regarded as indicia for determining the real market value. The coat itself was not produced, and after some search we are unable to find any evidence in the record from which the fair cash market value of it when it was delivered to plaintiff and later when returned by plaintiff to defendant can be determined. Such evidence was necessary and the burden of proof was on defendant

...was furnished to the witness. ...
...is now called to the stand ...
...the witness. ...
...at defendant upon the original claim ...

...As to plaintiff's claim, the ...
...ity is established by a ...
...plaintiff, the ...
...was brought to the ...
...evidence as to ...
...the ...
...a ...
...The ...
...submitted in ...
...and that the ...
...thereafter ...
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...that plaintiff's ...
...changed ...
...the value of the ...
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...however, ...
...that it ...
...value. ...
...are ...
...that ...
...after ...
...that ...

to produce it. She did not produce it and for that reason the judgment in her favor against plaintiff must be reversed.

The judgment in favor of defendant against plaintiff upon the original claim is affirmed. The judgment in favor of defendant against plaintiff on the counter-claim is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

O'Connor, P. J., and McSurely, J., concur.

to produce it. One has not produced it and the other cannot do

without an act which is not possible.

The passage in terms of knowledge is not identical with

the passage in terms of knowledge. The passage in terms of knowledge

is identical with the passage in terms of knowledge.

It is identical with the passage in terms of knowledge.

It is identical with the passage in terms of knowledge.

37934

T. J. KNEGAN et al.,
Appellants,

vs.

THOMAS J. COURTNEY, State's Attorney
of Cook County, Illinois, et al.,
Appellees.

70 4
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 629⁴

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

June 27, 1933, complainants, five individuals, as officers of the Chicago Teamsters, Chauffeurs and Helpers Union of Chicago and Vicinity, in behalf of themselves and of eighteen local unions affiliated with the Teamsters Union, filed their bill against Thomas J. Courtney, State's Attorney of Cook county, Edward J. Kelly, Mayor of the City of Chicago, and James P. Allman, Commissioner of Police of the City of Chicago, praying that defendants be enjoined from combining and conspiring to prevent complainants from holding meetings and from interfering with complainants in their several occupations as members of the unions. Defendants answered, denying all charges of wrongdoing made against them. The case was referred to a Master in Chancery, who took the evidence, made up his report, and recommended that a decree be entered dismissing the bill for want of equity. Complainants filed objections to the report, most of which were overruled, and on the hearing before the Chancellor the Master's report was approved, a decree entered dismissing the bill for want of equity, and complainants appealed to the Supreme court, contending inter alia that constitutional questions were involved. The Supreme court, upon consideration, transferred the case to this court.

Complainants say that the eighteen unions have about 18,000 members; that they are carrying on their union activities, and its members are employed in their several lines of work in a legitimate manner and in no way interfere with the defendants; that the defendants, the State's Attorney, the Mayor and the Commissioner of Police

THOMAS J. GOURNEY, State's Attorney
of Cook County, Illinois, et al.,
Appellants,

vs.

JOHN J. HANCOCK, et al.,
Appellees.

CHIEF CLERK
OF COOK COUNTY

1932

REPLY TO THE BRIEF OF THE COMPLAINANTS
IN THE MATTER OF THE ELECTION OF THE COMPLAINANTS

June 27, 1932, complainants, five individuals, as officers of the Chicago Teachers, Chauffeurs and Helpers Union of Chicago and vicinity, in behalf of the union and of eighteen local unions affiliated with the Teachers Union, filed with the County Clerk of Cook County, Illinois, a bill for writ of equity, praying that the City of Chicago, the City of Chicago, and James P. Allison, Commissioner of Public Safety, be enjoined from interfering with complainants in their several occupations and from interfering with complainants from holding meetings and from interfering with complainants in their several occupations as members of the union. Defendants answered, denying all charges of wrongdoing made against them. The case was referred to a master in equity, who took the evidence, made up his report, and recommended that a decree be entered dismissing the bill for want of equity. Complainants filed objections to the report, most of which were overruled, and on the hearing before the Chancellor the master's report was approved, a decree entered dismissing the bill for want of equity, and complainants appealed to the Supreme Court, contending that the bill was not a bill for writ of equity. The Supreme Court, upon consideration, transferred the case to this court. Complainants say that the eighteen unions have about 12,000 members; that they are working on their union activities; and the members are employed in their several lines of work in a legitimate manner and in no way interfere with the defendants; that the defendants, the City of Chicago, the City of Chicago, and James P. Allison, are interfering with the complainants in their several occupations and from interfering with complainants from holding meetings and from interfering with complainants in their several occupations as members of the union.

have entered into an unlawful conspiracy to compel complainants to withdraw from their respective unions and to become members of another union, viz., the International Brotherhood of Teamsters, Chauffeurs and Helpers Union; that defendants, by using the police force, have prevented complainants from holding a number of meetings of their unions and on several occasions have arrested many of complainants and had them incarcerated in jail; that charges of disorderly conduct were filed against some of these men, but upon hearings in the Municipal court of Chicago they were all discharged; that in some cases some of the complainants were arrested and kept in jail for a number of days and in many instances no charge was placed against them.

In addition to the prayer for an injunction there was a prayer for an accounting for damages claimed to have been sustained by complainants on account of the unlawful acts of the defendants. The defendants answered the bill, denying all charges of wrongdoing and in this answer the State's Attorney admits that all but four of the unions have, at all times, conducted themselves in a proper and lawful manner; that the only unions against which defendants make complaint are Local 701, Yardmen, Makers and Helpers Union; Local 704, Chicago Coal Teamsters, Chauffeurs and Helpers Union; Local 726, Sanitary Teamsters, Chauffeurs and Helpers Union, and Local 731, Excavating Teamsters, Chauffeurs and Helpers Union.

The State's Attorney's answer further sets up that the four unions mentioned have, through violence and intimidation, dictated to various industries what men they shall employ and on what terms they shall work; that this has been brought about by campaigns of terrorism, bombings and destruction of property; that various employers and employees have called upon the defendants, as law enforcing officers, to intervene for their protection, and that defendants, as law enforcing officers, intervened to prevent riots and to pre-

have entered into an unlawful conspiracy to compel employers to withdraw from their respective unions and to become members of another union, viz., the International Brotherhood of Teamsters, Local 104, Chicago, Illinois; that defendants, by their acts and omissions, have prevented plaintiffs from obtaining a number of new jobs of their unions and on several occasions have threatened many of plaintiffs and had them incarcerated in jail; that charges of discrimination were filed against some of these men, but upon hearing in the Municipal Court of Chicago they were all dismissed; that in some cases some of the defendants were arrested and held in jail for a number of days and in many instances no charge was filed against them.

In addition to the prayer for an injunction there was a prayer for an accounting for damages claimed to have been sustained by plaintiffs on account of the unlawful acts of the defendants. The defendants asserted the Bill, denying all charges of wrongdoing and in this matter the State's Attorney admits that all but two of the unions have, at all times, conducted themselves in a proper and lawful manner; that the only unions which were not so conducted were Local 104, Teamsters, Chicago, Illinois and Local 104, Teamsters, Chicago, Illinois; that the only unions which were not so conducted were Local 104, Teamsters, Chicago, Illinois and Local 104, Teamsters, Chicago, Illinois.

The State's Attorney's answer further sets up that the two unions mentioned have, through violence and intimidation, distributed to certain industries what men they could employ and on what terms they could work; that this has been brought about by campaigns of intimidation, threats and destruction of property; that certain plaintiffs and employees have called upon the defendants, as law enforcement officers, for their protection, and that defendants, in law enforcement officers, intervened to prevent riots and to prevent

serve the public peace. The answer denies that the State's Attorney caused employers to be arrested to force them to hire only members of the International Union, but avers that on occasions he caused the arrest of certain employers who were attending a meeting of an organization known as "Trucking and Teaming Exchange (popularly known as T. E. T.)"; that this organization was dominated and controlled by well known gangsters and racketeers with criminal records, and was attempting to continue to affiliate with the Teamsters Union; that the Mayor of the City had ordered the affiliation of all trucks engaged by the City with the "Trucking and Teaming Exchange" discontinued at once; that as a result of this there was a strike called by Local 726, Sanitary Teamsters, Chauffeurs and Helpers Union, which was engaged by the City in the removal of garbage, and as a result the health of the inhabitants of the city was endangered. The answer further sets up in considerable detail numerous other alleged violations of law by certain of the complainants which we think it unnecessary to further mention here, and avers that all acts done by the State's Attorney were to preserve law and order in the community.

The Mayor and the Commissioner of Police filed a joint and several answer in which all wrongdoing on their part was denied, and averred that numerous persons having criminal records, and others wanted by the police for the commission of crimes, congregated in public places under the guise or subterfuge of holding union meetings, and that the police attended such meetings for the purpose of preventing riots and other crimes.

The record is voluminous, containing about 2500 pages. The evidence tends to show that, as has been the custom for many years, a number of police officers were assigned by the City to the State's Attorney's office and are under his supervision; that at the time in question 60 to 80 police officers, under Captain

Gilbert, were assigned to the State's Attorney's office; that the State's Attorney became convinced that some of the unions in question were dominated and controlled by the criminal element and that the great mass of the members, who were law abiding^{and honest} men, had little or no voice in the affairs of their unions, and he decided to use the power of his office to remove the dominance of such element. To bring this about he sought to have the members of certain of the unions sever their membership with their respective unions and to transfer their membership to the International Union, which he thought was properly conducted and free from the dominance of the criminal element. And in May, 1933, using the police assigned to his office and also other police officers of the City to the number of about 250, he prevented meetings that were sought to be held by Local Union 701 and Local Union 704.

Complainants offered evidence tending to show that these meetings were in every way lawful and that the interference by the State's Attorney was wholly unwarranted; on the other side, there is evidence to the effect that some of the criminal element were attending the meetings and that the police prevented the meetings to maintain law and order. The evidence further tends to show that May 26, 1933, a meeting of the members of Local 726, Sanitary Teamsters, Chauffeurs and Helpers Union, whose members were mostly employed by the City in removing ashes and garbage, was called at the instance of the Commissioner of Public Works of the City, and counsel for complainants say in their brief that the police broke up this meeting. It seems a little difficult to understand why a meeting called by the Commissioner of Public Works of the City should be prevented by police officers of the City, but we think this point unimportant. The evidence further shows that a strike of the union whose members were engaged in removing ashes and garbage was called May 22nd, and complainants contend that the calling of this strike

... were assigned to the ...
State's Attorney became convinced that some of the unions in ques-
tion were dominated and controlled by the criminal element and honest
the great mass of the members, who were law abiding, and his office
on no voice in the affairs of their unions, and he decided to use
the power of his office to remove the dominance of such element.
To bring this about he sought to have the members of certain of the
unions sever their membership with their respective unions and to
exercise their membership in the International Union, ...
... was properly conducted and free from the influence of the
criminal element. And in May, 1935, when the police assigned to
his office and also other police officers of the city to the extent
of about 250, he prevented meetings from being held in the hall of
Local Union 701 and Local 611 on May 1.
Complainants offered evidence tending to show that these
meetings were in every way lawful and that the intervention of the
State's Attorney was wholly unnecessary; on the other side, however,
is evidence to the effect that some of the criminal element were
attending the meetings and that the police prevented the meetings
to maintain law and order. The evidence further seems to show that
May 22, 1935, a meeting of the members of Local 701, ...
State, ... and ... whose members were mostly ...
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prevented by police officers of the City, but we think this point
unimportant. The evidence further shows that a strike of the union
was ... were engaged in removing ... and ... was called
May 22, 1935, and complainants contend that the calling of this strike

resulted from the fact that the City of Chicago was employing men on account of their political affiliations who were not members of the union, and there is other evidence that might indicate this trouble was brought about in part, at least, by the action of the City officials in refusing to submit to the demands of the Trucking and Teaming Exchange. After members of this union went on strike they were ordered back to work by the city officials, and they said that since such men were civil service employees, charges would be filed against them before the Civil Service Commissioners unless they returned to their work. A number of such charges were filed, and some of the men discharged. The strike was called off and the men returned to work on May 29th.

The evidence further shows that there was considerable trouble between the unions and the police and the State's Attorney's office from May until July and thereafter; that many arrests were made, some of the men locked up, and a number of union meetings prevented; charges were filed against some of those arrested but in no case was any of the men found guilty. About the first of July a number of men were arrested and thrown into jail where they remained until about July 5th.

The evidence further shows that during the troubled period the members of the unions and their officials were addressed by the State's Attorney, on some of which occasions the evidence tends to show, the State's Attorney advised in no uncertain terms that the men should withdraw from their local unions and join the International Union; that on other occasions employers, at the State's Attorney's request, met with him, he stated his views of the matter, and advised that they employ only members of the International Union.

There is other evidence in the record that a number of men connected with the complainants were charged by defendants to have criminal records, but when witnesses were put on the stand it ap-

transmitted from the fact that the ship of course was employed and on account of their political affiliations who were not members of the union, and there is other evidence that would indicate this trouble was brought about in part, at least, by the action of the City officials in refusing to admit to the members of the Shipping and Docking Association. After members of this union went on strike they were ordered back to work by the city officials, and they said that since such men were civil service employees, managers said in that regard that they were still service employees and that they returned to their work. A number of men however were fired, and some of the men discharged. The strike was called off and the men returned to work on May 19th.

The evidence further shows that there was considerable trouble between the union and the police and the City's attorney's office from May 19th and thereafter; that many arrests were made, some of the men locked up, and a number of union meetings prevented; charges were filed against some of those arrested but in no case was any of the men found guilty. About the first of July a number of men were arrested and thrown into jail where they remained until about July 25th.

The evidence further shows that during the troubled period the members of the union and their officials were addressed by the State's attorney, in some of which occasions the evidence tends to show, the State's attorney advised him no uncertainty terms that the men should sign the new laws which would make the International Union; that on other occasions employees, at the State's attorney's request, met with him, he stated his view of the matter, and advised that they employ only members of the International Union.

There is some evidence in the record that a number of men contacted with the police and were charged with violations of laws relating thereto, but when witnesses were put on the stand it ap-

peared that most of the persons so accused were without any criminal record and many of them had never been arrested.

Complainants say that if the State's Attorney were successful in causing members of the local unions in question to transfer their membership to the International Union, this would result in great property damage because many of the unions were obligated on leases and had sick and death benefits. If the members should transfer to the International Union it is not at all clear that this would result in any loss to the membership because the property and rights might be taken over by the new union for the benefit of its members; but in any event, complainants would not be entitled to recover damages in this suit. Carpenters' Union v. Citizens Committee, 333 Ill. 225-257.

Complainants contend that under the Constitution and laws of this State and of the Nation, they had a right to assemble in a peaceable manner, as they attempted to do on numerous occasions, and that the State's Attorney and the other defendants should have been enjoined from interfering with such meetings. There can be no question about the legal right of complainants to organize as members of a union and to hold meetings in a lawful and peaceable manner for the purpose of discussing anything that would tend to promote their welfare so long as it involved no breach of the peace. They may join or refrain from joining any union without interference or otherwise from the State's Attorney, the Mayor, or anyone else. As said by our Supreme court in Carpenters' Union v. Citizens Committee, 333 Ill. 225 (238), "Every man has a right to full freedom in the disposal of his labor according to his will, and workmen have a right to organize for the purpose of promoting their common welfare by lawful means. They may impose any condition of their employment which they may regard as beneficial to them, and, if not bound by contract, may abandon their employment at any time, either singly or in a body,

...that most of the persons so accused were without any criminal record and many of them had never been arrested.

Complainants say that if the State's Attorney were successful

in causing removal of the local unions in question to transfer

their members to the International Union, this would result in

great property damage because many of the unions were obligated on

leases and had sick and death benefits. If the members should trans-

fer to the International Union it is not at all clear what this would

result in any loss to the membership because the property and assets

might be taken over by the new union for the benefit of its members;

but in any event, complainants would not be entitled to recover

damages in this suit. Complaints, Union v. International Union, 223

Ill. 125-127.

Complainants contend that under the constitution and laws of

this State and of the Union, they had a right to assemble in a peace-

ful manner, as they attempted to do on numerous occasions, and that

the State's Attorney and the other defendants should have been con-

sidered from interfering with such meetings. There are no witnesses

showing the legal right of complainants to organize as members of a

union and to hold meetings in a lawful and peaceful manner for the

purpose of discussing anything that would tend to promote their wel-

fare as long as it involved no breach of the peace. They may join

or refrain from joining any union without incurring any legal liability

from the State's Attorney, the State, or anyone else. As held by the

Supreme Court in Carroll v. United Brotherhood of Carpenters, 223 Ill.

125 (1908), "every man has a right to join freedom in the exercise of

his labor according to his will, and no man has a right to organize

for the purpose of promoting their common welfare by lawful means.

They may impose any condition of their employment which they may

reasonably demand as they see fit, and, if not bound by contract, may

terminate their employment at any time, either singly or in a body,

with or without cause. They have the right to a free and open market in which to dispose of their labor." There is some evidence tending to show that this right to peacefully assemble was unduly interfered with by the State's Attorney and the police officers, but there is no evidence in the record that tends to show that the State's Attorney or the police officers under his charge were acting from ulterior motives, but on the contrary the overwhelming weight of the evidence is to the effect that what was done in this respect was actuated by the belief that it was for the best interest of the community and for the maintenance of law and order.

It further appears from all the evidence in the record that what the State's Attorney said and did toward the union men transferring their memberships from local unions to the International Union was solely because he was of opinion that this would benefit the men employed in their several occupations and tend to promote law and order in the community. There is no suggestion to the contrary found in the brief of counsel for complainants. "As a general rule, equity will not enjoin the exercise of police power given by law to the officers of a municipal corporation, or interfere with the public duties of any of the departments of government, or restrain proceedings in a criminal matter." Chicago Public Stock Exch. v. McLaughry, 148 Ill. 372-390. But where a public official acts from fraudulent and malicious motives arbitrarily and without justification, a court of equity will enjoin such illegal acts to prevent irreparable injury or a multiplicity of suits. Carter v. City of Chicago, 57 Ill. 283; Chicago Public Stock Exch. v. McLaughry, 148 Ill. 372. "by irreparable injury is not meant that the injury is beyond the possibility of repair by money compensation, but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice." Delux Motor Co. v. Dever, 252 Ill. App. 165.

with or without cause. They have the right to a free and open market in which to dispose of their labor. There is some evidence tending to show that this right is a socially essential and legally enforceable right by the State's attorney and the police officers, but there is no evidence in the record that tends to show that the State's attorney or the police officers under his charge were acting from sinister motives, but on the contrary the overwhelming weight of the evidence is to the effect that this was done in this respect was actuated by the belief that it was for the best interest of the community and for the maintenance of law and order.

It further appears from all the evidence in the record that when the State's attorney said and did caused the union men to leave their their membership from local unions to the International Union was solely because he was of opinion that this would benefit the men employed in their several occupations and tend to promote law and order in the community. There is no suggestion to the contrary found in the brief of counsel for complainants. As a general rule, equity will not enjoin the exercise of police power given by law to the officers of a municipal corporation, or interfere with the public action of any of the departments of government, or restrain or interfere in a general manner. Chicago Public Works Employees v. Chicago, 125 Ill. 373-380. And where a public official acts from honest and malicious motives arbitrarily and without justification, a writ of habeas corpus will issue with interest costs as against the government. Chicago Public Works Employees v. Chicago, 125 Ill. 373-380.

It is respectfully submitted that the injury is not such that the injury is beyond the possibility of repair by money compensation, but it must be of such a nature that no fair and reasonable return may be had in a writ of law and that the defendant's action is a denial of justice. Chicago Public Works Employees v. Chicago, 125 Ill. 373-380.

In the instant case the State's Attorney is clothed with a broad discretion in performing the duties of his office, and courts of equity will not, except in a very plain case of arbitrary abuse, interfere with such discretion. ^{In} Carter v. City of Chicago, 57 Ill. 283, the court, speaking by Mr. Justice McAllister, said (p. 288): "The question for decision is not whether a court of equity will interfere with the exercise within its proper limits, of a public political power vested in the city, which necessarily involves the largest discretion; but whether in the case of a plain departure from the power which the law has vested in it, and from fraudulent and malicious motives, it is, by the use of property which it holds in trust for the benefit of the public, about to do an irreparable injury to the property of individuals, a court of equity will intervene to prevent such injury."

In Delaney v. Flood, 183 N. Y. 323, the court of appeals of New York, in reversing an injunctional order whereby a police captain of New York City was enjoined, said (p. 329): "Such a situation as is presented in the case at bar is one which, in its very nature, cannot be adequately dealt with by a court of equity. What might be a trespass at one instant of time may be a perfectly justifiable and necessary act at another."

Upon a consideration of all the evidence in the record it is clear that there were no fraudulent or malicious motives on the part of the State's Attorney or of the other defendants; that the law placed a large discretion in the defendants with which a court of equity will not interfere.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Matchett, JJ., concur.

In the instant case the State's Attorney is obliged with a
typical discussion in performing the duties of his office, and course
of which will not, except in a very small number of instances, be

interfere with such discussion. In State v. Smith, 17
Ill. 232, the court, speaking by Mr. Justice McLean, said (p. 232):
"The question for decision is not whether a court of equity will in-

terfere with the exercise within its proper limits, of a public
political power vested in the city, which necessarily involves the
exercise of discretion; but whether in the case of a public corporation

from the power which the law has vested in it, and from its position
as a political entity, it is to be held to be subject to the same
in regard to the exercise of the public power as an individual

entity to the property of individuals, a court of equity will in-
terfere to prevent such injury."
In State v. Smith, 17 Ill. 232, the court is quoted as saying

New York, in reversing an injunction order whereby a police
captain of New York City was enjoined, said (p. 232): "When a
discussion as is presented in the case at bar is one which, in the

view of the court, cannot be adequately dealt with by a court of equity,
then equity is a tribunal of last resort of the city of New York
independent and necessary and as essential."

Upon a consideration of all the evidence in the record it is
clear that there were no fraudulent or malicious motives on the part
of the State's Attorney or of the city authorities; and that the

State's Attorney in the determination with which he acted of
the matter will not interfere.

The decree of the Superior court of Cook county is affirmed.
JUDGMENT AFFIRMED.

REPORTED BY JAMES H. HARRIS, JR., CLEVELAND, OHIO.

37879

GEORGE BAMBAKARIS,
Appellee.

vs.

L. O. THIEME, trading as
L. O. THIEME & COMPANY,
Appellant.

714
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 6301

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for services rendered defendant, claiming that defendant promised to pay him \$500; upon trial by the court judgment was for \$349, from which defendant appeals.

Defendant admits employing plaintiff but says that the compensation was not named. Plaintiff testified to a promise by defendant to pay him \$500.

Defendant testified that he was in business in Chicago, locating and representing heirs with regard to their inheritance. On his impressive letterhead his business is stated as "International Law and Banking Exchange," with offices or connections in many of the prominent cities in the United States. He desired to secure a power of attorney from George Kasidigonis authorizing defendant to act in connection with some interest Kasidigonis had in an estate in California.

Hugo Schmidt testified that he was associated with the defendant and endeavored to get George Kasidigonis to execute a power of attorney for the defendant to represent him but the witness failed because Kasidigonis did not understand English; he then brought plaintiff, who speaks Greek, to defendant, and some arrangement was made for plaintiff to attempt to secure the power of attorney; about two weeks later plaintiff brought Kasidigonis to defendant's office, where defendant explained the power of attorney and plaintiff translated to Kasidigonis in the Greek language.

APPLICANT
APPLICANT

L. O. WILSON, President
L. O. WILSON COMPANY
Applicant

279 I.A. 680

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for services rendered defendant, claiming that defendant promised to pay him \$200; upon trial by the court judgment was for \$200, from which defendant appeals.

Defendant admits that he was in business in Chicago, Illinois, and representing others with regard to their investments. Plaintiff testified that he was in business in Chicago, Illinois, and representing others with regard to their investments.

Plaintiff testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Defendant testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Plaintiff testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Defendant testified that he was in business in Chicago, Illinois, and representing others with regard to their investments.

Plaintiff testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Defendant testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Plaintiff testified that he was in business in Chicago, Illinois, and representing others with regard to their investments. Defendant testified that he was in business in Chicago, Illinois, and representing others with regard to their investments.

Plaintiff testified, confirming Schmidt's testimony and that he had several talks with Kasidigonis, that he had spent a good deal of time and over \$100 in an endeavor to get him to go to defendant's office; that when they met at the office plaintiff explained the power of attorney to Kasidigonis in Greek; plaintiff said that at first Kasidigonis did not want to sign the papers; that then defendant whispered to plaintiff that if he would get him to sign the power of attorney he would pay plaintiff \$500; that plaintiff succeeded in persuading Kasidigonis to sign the papers; that defendant has not paid him anything for his services. There is a letter in the record written by defendant to plaintiff in which a remittance for the services is promised just as soon as defendant receives his fee from California.

Defendant's testimony confirms the testimony of the other witnesses except that he denies he ever whispered to plaintiff that he would pay him \$500; defendant says, in effect, that no amount of compensation for plaintiff's services was mentioned, and in defendant's opinion the services rendered by plaintiff were worth about \$50.

Defendant's fee for representing George Kasidigonis in the estate matter was \$698; the trial court awarded plaintiff one-half this amount. This award was influenced by the critical attitude of the trial court toward what he thought to be the practice of law by defendant, who was not a licensed attorney. However justified may have been the strictures of the court, the conduct of defendant is hardly sufficient grounds for compelling him to divide his fees with plaintiff.

The services of plaintiff were obtained because of the fact that he could speak both English and Greek and could act as an interpreter between defendant and Kasidigonis, who spoke no English. He is entitled to receive fair compensation for his services, together with any expenses incurred by him in the matter. He testified

Plaintiff testified, continuing Defendant's testimony and that he had several talks with Defendant, that he had spent a good deal of time and over \$100 in an endeavor to get him to go to Defendant's office; that when they met at the office Plaintiff explained the power of attorney to Defendant in Green; Plaintiff said that at that time Defendant did not want to sign the power; that then Defendant whispered to Plaintiff that if he would get him to sign the power of attorney he would pay Plaintiff \$200; that Plaintiff succeeded in persuading Defendant to sign the power; that Defendant had not paid him anything for his services. There is a letter in the record written by Defendant to Plaintiff in which a remittance for the services is promised (but as soon as Defendant received his fee from California).

Defendant's testimony confirms the testimony of the other witnesses except that he denied he ever whispered to Plaintiff that he would pay him \$200; Defendant says, in effect, that no amount of compensation for Plaintiff's services was mentioned, and in Defendant's opinion the services rendered by Plaintiff were worth about \$50.

Defendant's fee for representing George Washington in the estate matter was \$250; the first check mailed Plaintiff contained this amount. This amount was introduced by the official entries of the trial court toward what he thought to be the price of law by Defendant, and was not a witness statement. However, Plaintiff may have been the attorney of the court, the counsel of defendant as largely entitled grounds for compensation are to divide his fees with the services of Plaintiff were obtained because of the fact that he could speak both English and Green and could act as an interpreter between Defendant and Washington, and could be helpful. He is entitled to receive their compensation for his services, together with any expenses incurred by him in the matter. He testified

that he had spent \$100 in securing Masidonis' consent to the execution of the power of attorney. This seems a large sum.

In view of the amount of defendant's fees in connection with the California matter, we are of the opinion that \$150 would be ample compensation to cover plaintiff's expenses and services.

The judgment will therefore be reversed and judgment entered in this court for plaintiff for \$150. Each party to stand his own costs of this appeal.

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

O'Connor, P. J., and Matchett, J., concur.

that he had spent time in studying the subject, and that he was
anxious to see the report of the committee. This was a large sum.
In view of the amount of the subject's time in connection
with the California matter, we are at the expense that the work
be made immediately as soon as possible. The subject's opinion and
the subject will therefore be received and the subject will
be in the same way for the subject. The subject will be
the same way of the subject.

Subject, 7. 1. and subject, 8. 1. subject.

37901

DORA H. PRESTON,
Appellant,

vs.

HENRY P. KNIGHT,
Appellee.

727
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

279 I.A. 630²

MR. JUSTICE McNUMERY DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck and injured by an automobile belonging to and driven by defendant; she brought suit for damages and upon trial the jury acquitted the defendant; plaintiff appeals from the judgment that she take nothing.

Counsel for defendant raises certain points of practice relating to the bill of exceptions, motion for new trial, objections to instructions, etc. The claim is made that plaintiff has not properly preserved for review the questions raised by her and has not complied with the provisions of the old Practice act or the new Practice act which went into force January 1, 1934. We do not care to discuss these points but prefer to consider this case in the spirit of section 4 of the new civil Practice act, which provides that cases should be considered and determined according to the substantive rights of the parties.

Plaintiff says the verdict of the jury is against the manifest weight of the evidence. The accident happened about one o'clock in the morning of August 14, 1932, on U. S. route No. 41, at a point in Lake county, in the vicinity of Waukegan, and in the region generally known as the Skokie Valley. Highway No. 41 runs north and south, with an 18 foot concrete pavement and 8 foot shoulders.

Plaintiff and her husband were going south in their automobile from Kenosha, Wisconsin, to their home in Waukegan, Illinois. Following them was another automobile driven by Albert Svoboda, accompanied by two young ladies; although it was a bright moonlight night there was some fog, intermittent but dense in spots; Svoboda's

car bumped into the rear of the Preston car and the Svboda car turned over, at an angle, into the north bound traffic lane; the Preston car ran on for about 100 feet, and plaintiff and her husband went back to the Svboda car to investigate. One of the young ladies in the Svboda car, Miss Hornik, was lying south of and alongside the upturned car, a little stunned; plaintiff says she sat down on the roadway and took Miss Hornik's head in her lap; while she was in this position defendant's car, coming from the south, struck her, inflicting serious injuries.

The defendant with Miss Peterson, his secretary, after a downtown business session and dinner with prospective clients, started northward toward Miss Peterson's home; defendant suggested that as it was a pleasant evening they take a farther ride; they drove north on Sheridan road through Evanston and Wilmette, cutting over west, reaching the highway known as No. 41; they proceeded north on this route and ran into several wisps of fog; defendant proceeded northward, intending to turn eastward on a cross-road running toward Sheridan road; the two headlights on defendant's car were burning brightly; there was also a spot light; the glare of the lights and of cars coming southward reflected on the particles of fog making it difficult to see ahead; his car was moving about fifteen miles an hour.

Mr. Preston testified that after the collision with the Svboda car he went southward to flag cars approaching from the south and flagged defendant's car. Defendant testified that he did not see him. The headlights of the parked Preston car headed south gave a blinding effect to the foggy atmosphere, concealing the Svboda car behind it; defendant's car at this time was going about five miles an hour - very slowly - when suddenly defendant saw plaintiff sitting in the north bound traffic lane directly in front of his car; his car stopped immediately after striking plaintiff.

car jumped into the rear of the Preston car and the two cars
burned over, at an angle, into the north bound traffic lane; the
Preston car ran on for about 100 feet, and finally
husband went into the two cars and so investigated. One of the
young ladies in the Preston car, also known, was found seated at
the rear of the Preston car, a little distance from the car;
she sat down on the ground and took some papers from her bag;
while she was in this position defendant's car, coming from the
west, struck her, killing her.
The defendant also testified, his testimony, that a
downtown business session and dinner with prospective clients,
which defendant himself had arranged to attend, was
that as it was a pleasant evening they took a further ride; they drove
north on Sheridan road through Evanston and Wilmette, coming over
west, reaching the highway known as No. 41; they proceeded north on
this road and ran into several miles of fog; defendant proceeded
westward, intending to turn eastward on a cross-street running across
Sheridan road; the two headlights on defendant's car were burning
brightly; there was also a weak light; the light of the lights and
of the car's engine reflected on the pavements of the road making it
difficult to see ahead; the car was moving about fifteen miles an hour;
Mr. Preston testified that after the collision with the
Greboda car he went eastward to the car approaching from the south
and changed defendant's car. Defendant testified that he did not see
him. The headlights of the parked Preston car flashed south over a
distance of about 100 feet, illuminating the road and
making it; defendant's car at this time was about 100 feet also
on hand - very slowly - when suddenly defendant saw a light reflecting
in the north bound traffic lane directly in front of his car; his car
stopped immediately after striking defendant.

There was sufficient evidence to justify the conclusion that the fog obstructed the defendant's vision. Some of the witnesses described the fog as "pea-soupy"; others, as "very dense." Svoboda testified that if it had not been for the fog he could have seen the tail light of the Preston car a long way ahead but that on account of the fog he did not see it until he was 25 feet away.

Although there are some variations in the testimony of the witnesses, the jury could properly conclude that defendant, under the circumstances, was free from any negligence, and that the sole cause of the accident was the fact that plaintiff placed herself in the line of north bound traffic where she ran the hazard of being struck by north bound vehicles; that defendant was driving slowly and on account of the fog did not see plaintiff until too late to avoid striking her.

Plaintiff complains of the instructions given at the request of defendant. The instructions criticized are not set out in the brief. Only stray sentences, disconnected from the body of the instructions, are quoted. "Instructions of which complaint is made should be set out in full, followed by definite and clear reasons supporting the alleged errors incident thereto." (General Platers Supply Co. v. Charles F. L'Honniedieu & Sons Co., 228 Ill. App. 201, 206.

The brief on behalf of plaintiff states in general terms that there were an undue number of instructions given on behalf of the defendant concluding with the phrase, "you must find the defendant not guilty," or similar phrases. As only these phrases are set forth in the brief we do not know in what connection they are used. We must assume in the absence of any claim to the contrary that the instructions containing these criticized words correctly stated the law. While the practice of giving an undue number of instructions has been criticized, as in Daubach v. Drake Hotel Co., 243 Ill.App.

There was sufficient evidence to justify the conclusion that the fog obstructed the defendant's vision. None of the witnesses testified that it was not foggy, as they said, "because the fog was not so thick as it was on the day of the shooting".

Although there are some variations in the testimony of the witnesses, the jury could properly conclude that defendant, under the circumstances, was free from any negligence, and that the safe coming of the accident was the fact that defendant placed himself in the line of traffic where there was the hazard of being struck by other moving vehicles; that defendant was driving slowly and on account of the fog did not see plaintiff until too late to avoid him.

1. The first sentence of the instruction given at the request of defendant is: "The instruction is not to be given to the jury unless the evidence is such that the jury is authorized to find that the defendant is guilty of the crime charged." This instruction is not given to the jury unless the evidence is such that the jury is authorized to find that the defendant is guilty of the crime charged.

The brief on behalf of plaintiff states in General Denno that there was no other basis for conviction, that in denial of the evidence submitted with the brief, "the court was misled and not guilty," or similar phrases. An only these phrases are set forth in the brief we do not know in what connection they are used. We must assume in the absence of any claim to the contrary that the instructions contained in the briefs were correctly stated and law. While the practice of giving an undue number of instructions has been criticized, as in *Barbosa v. Drake Hotel Co.*, 263 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 90

298, yet we do not find any case in which the judgment has been reversed solely because a number of instructions have been given which concluded with the phrase mentioned. In Carson, Pirie, Scott & Co. v. Chicago Ry. Co., 309 Ill. 346, it was held that where the instructions correctly state the law, any repetition which exists does not constitute ground for reversal.

The only instruction which plaintiff says does not correctly state the law is defendant's given instruction No. 4. Plaintiff presents only disconnected sentences from the instruction instead of setting forth the instruction in full. However, we have examined it and are of the opinion that it is proper. It sets forth defendant's theory of the case: that if defendant was driving through the fog at a slow rate of speed and used such care as an ordinarily prudent person would have used to avoid the accident, and nevertheless his car came in contact with the plaintiff, but not through any negligence or wilful and wanton conduct of the defendant, he should be found not guilty. Plaintiff claims that the instruction omitted the fact that Preston attempted to warn the defendant, and also the fact of the presence of cars, lights and people at the scene of the collision. Defendant testified that he did not see Preston or notice any attempt to flag or signal his car. Defendant was not bound to incorporate in his instruction the evidence on behalf of the plaintiff. It is not necessary in an instruction to embody in it an antagonistic theory. As was said in City of Chicago v. Schmidt, Adm'x, 107 Ill. 186, "any attempt to embody in one instruction all the hypothetical elements contained in the distinct and necessarily opposing views, would make the veriest nonsense." To the same effect are Dunn v. Orichfield, 214 Ill. 292, and Spengler v. Eiger, 255 Ill. App. 322.

Plaintiff says that instruction No. 4 assumes that "when the defendant saw the plaintiff he put on his brakes." Inasmuch as this

208, yet we do not find any case in which the judgment has been reversed. Indeed, it is a settled rule of law that a judgment is not reversible unless it is shown to be manifestly erroneous. In People v. Chicago Ry. Co., 209 Ill. 346, it was held that where the instructions correctly state the law, any repetition which exists does not constitute error for reversal.

The only instruction which defendant claims is erroneous is that the law is defendant's given instruction no. 4. Plaintiff gives only 6 recommended sentences from the instruction instead of setting forth the instruction in full. However, we have examined it and are of the opinion that it is proper. It sets forth defendant's theory of the case: that if defendant was driving through the fog at a slow rate of speed and used such care as an ordinarily prudent person would have used to avoid the accident, and nevertheless his car came in contact with the plaintiff, but not through any negligence on either side, and without any wrong conduct of the defendant, he should be found not guilty. Plaintiff claims that the instruction omitted the fact that person attempted to warn the defendant, and also the fact of the presence of cars, lights and people at the scene of the collision. Defendant testified that he did not see Preston or notice any attempt to warn or signal his car. Defendant was not bound to incorporate in his instruction the evidence on behalf of the plaintiff. It is not necessary in an instruction to embody in its own language the theory. As was said in People v. Chicago Ry. Co., 209 Ill. 346, "any attempt to embody in one instruction all the legal elements contained in the facts and necessarily existing there, would make the entire instruction a mere repetition of the facts, and would be error." People v. Chicago Ry. Co., 209 Ill. 346, 351. Plaintiff says that instruction no. 4 assumes that "when the defendant saw the plaintiff he put on his brakes." Instruction no. 4

fact was established by the uncontroverted evidence it was not error to state it in the instruction. Marion v. Public Service Co. of Northern Illinois, 219 Ill. App. 180; Clarke v. Fancher, 188 Ill. 375; Department Public Works v. McBride, 338 Ill. 347.

The verdict was not against the manifest weight of the evidence and there were no reversible errors upon the trial. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

There are several reasons why the results of this study may not be generalizable to other populations. First, the study was conducted in a single, urban, tertiary care hospital. Second, the study was limited to a specific population of patients with a specific condition. Third, the study was limited to a specific time period. Fourth, the study was limited to a specific intervention. Fifth, the study was limited to a specific outcome measure. Sixth, the study was limited to a specific sample size. Seventh, the study was limited to a specific level of analysis. Eighth, the study was limited to a specific level of evidence. Ninth, the study was limited to a specific level of confidence. Tenth, the study was limited to a specific level of certainty.

It states: "In the investigation, research, and analysis of the

1972, 111-114, 1973, 115-118, 1974, 119-122, 1975, 123-126, 1976, 127-130, 1977, 131-134, 1978, 135-138, 1979, 139-142, 1980, 143-146, 1981, 147-150, 1982, 151-154, 1983, 155-158, 1984, 159-162, 1985, 163-166, 1986, 167-170, 1987, 171-174, 1988, 175-178, 1989, 179-182, 1990, 183-186, 1991, 187-190, 1992, 191-194, 1993, 195-198, 1994, 199-202, 1995, 203-206, 1996, 207-210, 1997, 211-214, 1998, 215-218, 1999, 219-222, 2000, 223-226, 2001, 227-230, 2002, 231-234, 2003, 235-238, 2004, 239-242, 2005, 243-246, 2006, 247-250, 2007, 251-254, 2008, 255-258, 2009, 259-262, 2010, 263-266, 2011, 267-270, 2012, 271-274, 2013, 275-278, 2014, 279-282, 2015, 283-286, 2016, 287-290, 2017, 291-294, 2018, 295-298, 2019, 299-302, 2020, 303-306, 2021, 307-310, 2022, 311-314, 2023, 315-318, 2024, 319-322, 2025, 323-326, 2026, 327-330, 2027, 331-334, 2028, 335-338, 2029, 339-342, 2030, 343-346, 2031, 347-350, 2032, 351-354, 2033, 355-358, 2034, 359-362, 2035, 363-366, 2036, 367-370, 2037, 371-374, 2038, 375-378, 2039, 379-382, 2040, 383-386, 2041, 387-390, 2042, 391-394, 2043, 395-398, 2044, 399-402, 2045, 403-406, 2046, 407-410, 2047, 411-414, 2048, 415-418, 2049, 419-422, 2050, 423-426, 2051, 427-430, 2052, 431-434, 2053, 435-438, 2054, 439-442, 2055, 443-446, 2056, 447-450, 2057, 451-454, 2058, 455-458, 2059, 459-462, 2060, 463-466, 2061, 467-470, 2062, 471-474, 2063, 475-478, 2064, 479-482, 2065, 483-486, 2066, 487-490, 2067, 491-494, 2068, 495-498, 2069, 499-502, 2070, 503-506, 2071, 507-510, 2072, 511-514, 2073, 515-518, 2074, 519-522, 2075, 523-526, 2076, 527-530, 2077, 531-534, 2078, 535-538, 2079, 539-542, 2080, 543-546, 2081, 547-550, 2082, 551-554, 2083, 555-558, 2084, 559-562, 2085, 563-566, 2086, 567-570, 2087, 571-574, 2088, 575-578, 2089, 579-582, 2090, 583-586, 2091, 587-590, 2092, 591-594, 2093, 595-598, 2094, 599-602, 2095, 603-606, 2096, 607-610, 2097, 611-614, 2098, 615-618, 2099, 619-622, 2100, 623-626, 2101, 627-630, 2102, 631-634, 2103, 635-638, 2104, 639-642, 2105, 643-646, 2106, 647-650, 2107, 651-654, 2108, 655-658, 2109, 659-662, 2110, 663-666, 2111, 667-670, 2112, 671-674, 2113, 675-678, 2114, 679-682, 2115, 683-686, 2116, 687-690, 2117, 691-694, 2118, 695-698, 2119, 699-702, 2120, 703-706, 2121, 707-710, 2122, 711-714, 2123, 715-718, 2124, 719-722, 2125, 723-726, 2126, 727-730, 2127, 731-734, 2128, 735-738, 2129, 739-742, 2130, 743-746, 2131, 747-750, 2132, 751-754, 2133, 755-758, 2134, 759-762, 2135, 763-766, 2136, 767-770, 2137, 771-774, 2138, 775-778, 2139, 779-782, 2140, 783-786, 2141, 787-790, 2142, 791-794, 2143, 795-798, 2144, 799-802, 2145, 803-806, 2146, 807-810, 2147, 811-814, 2148, 815-818, 2149, 819-822, 2150, 823-826, 2151, 827-830, 2152, 831-834, 2153, 835-838, 2154, 839-842, 2155, 843-846, 2156, 847-850, 2157, 851-854, 2158, 855-858, 2159, 859-862, 2160, 863-866, 2161, 867-870, 2162, 871-874, 2163, 875-878, 2164, 879-882, 2165, 883-886, 2166, 887-890, 2167, 891-894, 2168, 895-898, 2169, 899-902, 2170, 903-906, 2171, 907-910, 2172, 911-914, 2173, 915-918, 2174, 919-922, 2175, 923-926, 2176, 927-930, 2177, 931-934, 2178, 935-938, 2179, 939-942, 2180, 943-946, 2181, 947-950, 2182, 951-954, 2183, 955-958, 2184, 959-962, 2185, 963-966, 2186, 967-970, 2187, 971-974, 2188, 975-978, 2189, 979-982, 2190, 983-986, 2191, 987-990, 2192, 991-994, 2193, 995-998, 2194, 999-1002, 2195, 1003-1006, 2196, 1007-1010, 2197, 1011-1014, 2198, 1015-1018, 2199, 1019-1022, 2200, 1023-1026, 2201, 1027-1030, 2202, 1031-1034, 2203, 1035-1038, 2204, 1039-1042, 2205, 1043-1046, 2206, 1047-1050, 2207, 1051-1054, 2208, 1055-1058, 2209, 1059-1062, 2210, 1063-1066, 2211, 1067-1070, 2212, 1071-1074, 2213, 1075-1078, 2214, 1079-1082, 2215, 1083-1086, 2216, 1087-1090, 2217, 1091-1094, 2218, 1095-1098, 2219, 1099-1102, 2220, 1103-1106, 2221, 1107-1110, 2222, 1111-1114, 2223, 1115-1118, 2224, 1119-1122, 2225, 1123-1126, 2226, 1127-1130, 2227, 1131-1134, 2228, 1135-1138, 2229, 1139-1142, 2230, 1143-1146, 2231, 1147-1150, 2232, 1151-1154, 2233, 1155-1158, 2234, 1159-1162, 2235, 1163-1166, 2236, 1167-1170, 2237, 1171-1174, 2238, 1175-1178,

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44. To further illustrate the fact that the above is not a simple

THE UNITED STATES DEPARTMENT OF JUSTICE

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37945

WALERIA KASPRZYK,

Appellee,

vs.

ROSE BELAKIEWICZ et al.,
Appellants.

73 H
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

279 I.A. 630³

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered in a foreclosure suit. Bill was filed to foreclose a deed of trust executed by defendants Bernard Belakiewicz and Rose Belakiewicz, his wife, to Jozef Belakiewicz, trustee, to secure their note, dated September 21, 1928, for \$5000, payable to bearer at the rate of \$50 a month for seventy succeeding months, final payment of \$250 falling due September 1, 1936. Certain installments having fallen due and remaining unpaid, the entire amount was declared due and the bill to foreclose was filed; reference was had to a master who reported, recommending a decree. The note recited that the installments due should be paid in gold coin of the United States of standard weight and fineness. Defendants, by various answers, sought to present the defense that there was an agreement that these installments could be paid through another medium, namely, board and lodging.

Defendants argue that the record shows that on or about August 12, 1928, Jozef Belakiewicz and Frances, his wife, decided to distribute their property among their children; that pursuant to this they conveyed to Bernard Belakiewicz and Rose the premises herein involved, taking back in part payment the \$5000 note secured by the trust deed in question. They say they were not allowed to show that there was an agreement whereby Jozef and his wife should make their home with their son Bernard and his wife, for which the latter were to receive as a credit upon their note \$50 a month, representing the board and keep of Jozef and his wife. Upon the death of either of them the survivor was still to continue to board with

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289 L.A. 830

MR. JUSTICE ROBERTSON DELIVERED THE DECISION OF THE COURT.

This is an appeal from a decree entered in a partition suit. The bill as filed to partition a tract situated by defendant Robert Robertson and Rose Robertson, his wife, to Robert Robertson, trustee, to secure their note, dated September 21, 1923, for \$5000, payable to bearer at the rate of \$500 a month for twenty consecutive months, final payment of \$5000 being due on September 1, 1924. Certain provisions of the note and the bill as amended are cited; reference is made to a master's report, recommending a decree. The note recited that the installment should be paid in gold coin of the United States of standard weight and fineness. Defendant, by various answers, sought to present the defense that there was an agreement that these installments could be paid through another medium, namely, bonds and mortgages. Defendant argues that the record shows that on or about August 17, 1923, Robert Robertson and Rose, his wife, decided to purchase a certain property upon their installment; that payment of this they conveyed to Robert Robertson and Rose the premises therein involved, taking back in part payment the \$5000 note payable by the trust deed in question. They say they were not allowed to give back there was no agreement whereby Robert and his wife should give their home with their son Robert and his wife, for which the debt was to remain as a small loan until paid in cash, but retaining the home and land of Robert and his wife. Upon the facts at least it seems the survivor was still to continue to bond with

Bernard, who was to receive a credit of \$25 a month on account of the note.

The evidence shows that Jozef and his wife lived with Bernard from September, 1928, until June, 1931, and \$50 a month was credited on the note by Jozef Belakiewicz; his wife, Frances, died, in June, 1931, and from that time to November, 1931, Jozef continued to reside with his daughter-in-law, Rose Belakiewicz, whose husband had died in May, 1929; Jozef gave Rose a credit of \$25 a month for the time he was there. In November, 1931, Jozef left the name of his daughter-in-law Rose to live with his own daughter, Mrs. Kasprzyk, the complainant herein; he gave as his reason for leaving Rose Belakiewicz's home that he was not treated right; that he had to work there with the children, and that Rose complained that as long as he was living with her her own family could not visit her; Jozef also said the food was poor and the accommodations uncomfortable.

The question is whether parol evidence of an agreement that the installments of the note might be paid in board and lodging instead of money, was admissible. It might be noted that it is hardly credible that Jozef Belakiewicz made any agreement which would compel him to remain a boarder with his daughter-in-law under uncomfortable circumstances or else forfeit the right to demand payment of the installments of the note in money.

It has been settled by many decided cases that parol evidence is incompetent to vary the terms of a written contract, and especially is this true where the parol evidence undertakes to change the medium of money payment contained in a promissory note to something else. Mosher v. Rogers, 117 Ill. 446; Murchie v. Peck Bros. & Co., 160 Ill. 175; Armstrong Paint Works v. Can Co., 301 Ill. 102; Hinsdale State Bank v. Lytle, 262 Ill. App. 151; Shiel v. Chicago Title & Trust Co., 262 Ill. App. 410; Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 532.

But defendants argue that there is an exception to this rule where the parol agreement has been executed and is no longer executory. Undoubtedly this is the rule, and the part of the agreement to give credit on the note in return for board and lodging which has been accomplished is an executed matter, and complainant has made no attempt to recover for these months. But such an agreement is not binding as to the future executory part of the note. In Levy v. Greenberg, 261 Ill. App. 541, the lessor had voluntarily made a verbal reduction of rent to the lessee and had accepted payment at the reduced figure. It was held that as to these months the parol agreement was executed, but as to months for which payment had not been made the parol modification was executory and not binding and there could be a recovery in full. See also Snow v. Griesheimer, 220 Ill. 106.

This rule is as applicable in courts of equity as in courts of law. In Gibbons v. Bressler, 61 Ill. 110, it was so held, where it was sought by parol evidence to vary the terms of a written instrument. McNeynolds v. Stoats, 200 Ill. 22, is not to the contrary. That was a case where in an attempt to release a mortgage the word "quit-claim" was inadvertently used. It was held that the evident purpose was to release the mortgage.

There can be no estoppel in this case. Defendants Bernard and Rose Belakiewicz bought the property from Jozef and Frances Belakiewicz, giving as part purchase money their note for \$5000, payable in installments; when the first installment fell due the mortgagees agreed to accept board and lodging in lieu of cash as payment; the defendants had not changed their position to their disadvantage by this arrangement; they already owed the notes and were bound to pay in money unless the mortgagee would consent to accept some other medium as payment. Defendants imply a legal obligation on Jozef Belakiewicz to continue living with his daughter-in-law,

and defendant at the time as an exception to this rule
where the party agreement has been executed and is no longer execut-
ory. Undoubtedly this is the rule, and the part of the agreement
to give effect on the note in return for a deed and lodging which has
been accomplished is an executed matter, and consequently has made no
effect in favor of the bank. The bank is entitled to the
finding as to the future executory part of the note. In Bank of
Albany, 201 Ill. App. 3d, 281, the lessor had voluntarily made a
verbal reservation of part of the lease and had accepted payment of
the reduced figure. It was held that as to those months the verbal
agreement was executed, but as to months for which payment had not
been made the verbal reservation was executory and not binding and
there could be a recovery in full. See also Bank of Chicago, 201 Ill. App. 3d, 281.

This rule is so well settled in regard to deeds as to be
of law. In Bank of Chicago, 201 Ill. App. 3d, 281, it was held that
if the words of deed evidence its true intent and purpose, the
agreement, Bank of Chicago, 201 Ill. App. 3d, 281, is not to the contrary.
That was a case where in an attempt to release a mortgage the word
"quit-claim" was inadvertently used. It was held that the intent
expressed was to release the mortgage.

There can be no recovery in this case. Defendant turned
and then defendant bought the property from Janet and Thomas
defendant, giving as part purchase money their note for \$2000.
payable in installments; when the first installment fell due the
defendants agreed to accept a deed and lodging in lieu of cash as
payment; the defendants had not changed their position to their dis-
advantage by this arrangement; they already owed the note and were
bound to pay in money unless the mortgage would consent to accept
such other medium as payment. Defendant had a legal obligation
as Janet defendant to continue living with his daughter-in-law,

and yet in their brief they concede that if he did not wish to do so he could not be compelled to continue.

Some criticism is made of what is alleged to be the perfunctory attitude of two guardians ad litem for the five minor children of the defendant Rose Belakiewicz. The complainants had nothing to do with the guardians ad litem except to move for their appointment. The record does not show that there was any failure to present every defense which could be asserted on behalf of the minor children. Indeed, as far as the foreclosure was concerned the interests of Rose and the minors were identical.

It is said that the evidence is not sufficient to show a gift of the note and trust deed by Jozef Belakiewicz to the complainant. Jozef testified that he gave them to the complainant, his daughter, who also testified that her father Jozef had made a gift of the note and trust deed to her. Moreover, the production of the note by complainant was prima facie evidence of ownership, and where a defendant admittedly owes money he cannot complain that the complainant in a foreclosure suit who produced the notes was not the owner. Witting v. Claras, 274 Ill. App. 449.

We see no reason for disturbing the decree of the Superior court, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Watchett, J., concur.

and yet in their brief they concede that it is not true to say
as he could not be compelled to confess.

Some criticism is made of what is alleged to be the very
fanciful evidence of two witnesses as to the time when
William at the defendant's home. The complaint has
nothing to do with the evidence as to the time when he was
arrested. The record does not show that there was any failure
to present every witness who could be expected to testify to the
facts alleged. Indeed, as far as the testimony was concerned
the interests of both the state and the defendant were identical.

It is said that the evidence is not sufficient to show a
guilt of the crime and that such by legal authorities to the com-
plaint. That testimony that he gave him to the complaint,
his daughter, who also testified that her father had made a
guilt of the crime and that such to her. However, the production
of the note by complaint was giving facts evidence of ownership,
and shows a statement absolutely even money he cannot conceal that
the complaint in a testimony and who produced the note was
not the same. William, William, and his son, and
We see no reason for attacking the degree of the testimony
which, as it is stated.

WITNESSES

Witnesses: P. J. and William, J. J. ...

Filed March 11, 1935.

37210

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

SEYMOUR STEDMAN et al.,
Plaintiffs in Error.

CLERK TO CRIMINAL COURT
OF COOK COUNTY.

279 I.A. 630⁴

~~THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS, ON THE PETITION OF THE COURT.~~

On November 2, 1929, the City State Bank of Chicago was closed by the Auditor of Public Accounts, and Abel Davis was appointed receiver. Nearly 18 months afterward, on April 28, 1931, the grand jury of Cook county returned an indictment which charged that Stedman was vice-president, trust officer and director; Frank D. Robinson, vice-president and director; Frank A. Bergen, vice-president and director; Alexander L. Jarema, vice-president, cashier and director; William C. Hartray, Bennett J. C. Johnson, Edwin M. Rellihan and Morrison M. Castle, directors; that on the date it closed these persons "in their aforesaid respective official capacities as such officers of said City State Bank of Chicago, did unlawfully, wilfully and fraudulently receive from a certain depositor of said bank, to-wit, one Louise Green, a large amount of personal goods, money and property of said Louise Green, to-wit: to the amount of \$105, the said bank being then and there insolvent as the persons named and each of them well knew, whereby said persons are deemed to have committed the crime of embezzlement," and that the grand jurors say upon their oaths that the persons named "did feloniously steal, take, and carry away said money, personal goods and property of said Louise Green, then and there being found, contrary to the Statute," etc. The indictment was based on paragraph 38 of the Criminal Code (Cahill's Ill. Rev. Statutes, 1929, chap. 38, par. 38, p. 915).

There was a motion to quash the indictment on the ground that the grand jury was illegally drawn and selected. The motion

Filed March 1939

cont.

[illegible]

1. In 1950, the total number of people in the United States was 150,000,000.

SEASIDE, N.J.

There was a motion to dismiss the indictment on the ground that the grand jury was illegally drawn and constituted. The motion was denied.

was overruled by Judge Stanton, and a subsequent motion to vacate the order entered by Judge Stanton was denied by Judge Trade. Pleas in abatement and motions to quash were filed, averring that the grand jury was an unlawful body and that there were improper proceedings before it, in that unauthorized persons were permitted to be present during the examination of witnesses; that a false and prejudicial document was introduced by the state's attorney before the grand jury; that the directors of the bank named in the indictment were not officers of the bank within the meaning of the statute upon which the indictment was based; that the indictment did not positively aver the receipt of a deposit but only that there was received \$105 "as a deposit"; that the allegations of the indictment under a videlicet made the indictment inconsistent and repugnant to the charge; that the indictment should be quashed because it was duplicitous and ambiguous.

The pleas in abatement and the motions to quash the indictment were overruled, whereupon Stedman pleaded not guilty. Robinson pleaded guilty and testified for the State. After the trial he was released on parole for six months. Bergen testified for the State and a nolle prosequere was afterward entered as to him. Bennett^{Johnson} testified for the State and a nolle prosequere was subsequently entered as to him.

Motions in behalf of Stedman, Jaroma, Hartray and Castle for an instructed verdict in their favor at the close of all the evidence were denied. The cause was submitted to the jury, and there was a verdict of guilty as to each and all of these four. Stedman and Jaroma were sentenced to pay a fine of \$210 and to be imprisoned in the penitentiary for not less than one nor more than three years. Hartray, Rollins and Castle were sentenced to pay a fine of \$210. This writ of error is prosecuted by Stedman, Jaroma, Hartray and Castle.

3
The contention of defendants is that the grand jury was an unlawful body because it was not drawn as directed by the statute, has, pending this appeal been decided by the Supreme court in another case contrary to defendants' contention. People v. Linber, 357 Ill. 423.

Much of the brief is devoted to the argument that the indictment should have been quashed because a stenographer employed by the State's Attorney who was present to report the proceedings when some of the witnesses testified, was afterward sworn and heard as a witness. He was not an assistant state's attorney. On this question the authorities of the different jurisdictions are divided. State v. Salmon, 216 Mo. 466; Latham v. U. S., 141 U.S.A. 250; U.S. v. Philadelphia & Reading Ry., 221 Fed. ~~221~~ 683; U. S. v. Rubin, 218 Fed. 245; Commonwealth v. Harris, 231 Mass. 584. The court is, however, of the opinion that there was no showing of prejudice here which would have justified quashing the indictment for this reason. People v. Arnold, 243 Ill. 169; People v. Hartenblower, 233 Ill. 591; People v. Looney, 314 Ill. ¹⁵⁰ 159. *he*

It is also urged that the indictment was defective, in that there was no positive averment of the receipt of the deposit. The averment was that the money was received "as a deposit in said bank." Defendants cite the Dictionary and 5 Corpus Juris 593, to the effect that the word "as" does not mean "being," "was" or "for," and they say that this averment was therefore not positive. Read with the context, we think the averment is not doubtful and informed defendants fully of the nature of the charge and is therefore sufficient.

It is also urged that the allegations of the indictment under the videlicet are repugnant to the general charge. Apparently the pleader out of abundant caution under the videlicet went on to describe various amounts and kinds of money which it was averred

The contention of defendant is that the money was not
delivered to him because it was not shown as received by the bank.
Now, regarding this special check issued by the Supreme Court in another
case contrary to defendant's contention, People v. Smith, 1937 Ill.
193.

Each of the prior is devoted to the argument that the in-
direct evidence have been pushed because a statement was made
by the State's Attorney who was present to report the proceedings
when some of the witnesses testified, and statement were not heard
as a witness. He was not an assistant State's Attorney. On this
question the affidavits of the different jurisdictions are divided.
People v. Smith, 1937 Ill. 193; People v. Smith, 1937 Ill. 193; People v. Smith, 1937 Ill. 193;
People v. Smith, 1937 Ill. 193; People v. Smith, 1937 Ill. 193;
People v. Smith, 1937 Ill. 193; People v. Smith, 1937 Ill. 193;
It is also noted that the affidavits of the different jurisdictions are divided.
There was no positive statement of the receipt of the money. The
affidavit was that the money was received "as a deposit in said
bank." Defendant also the affidavit and a certain Davis 1937, 1937
the effect that the word "as" does not mean "only," "yes," or
"no," and they say that this affidavit was therefore not positive.
Read with the context, we think the affidavit is not doubtful and
inferred defendant's liability of the receipt of the money and in large
part withdrawn.

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"no," and they say that this affidavit was therefore not positive.
Read with the context, we think the affidavit is not doubtful and
inferred defendant's liability of the receipt of the money and in large
part withdrawn.

were deposited. Defendants say that if these averments are considered an essential part of the indictment, it charges not one but several offenses, and that these charges are repugnant to the general charge. We hold the averments are merely surplusage.

Defendants also say that the indictment improperly charged defendants were guilty of both embezzlement and larceny, making the indictment bad for duplicity. The point was not raised in the Criminal court upon the motion to quash, and we think defendants cannot be heard to urge it here. Moreover, the statute upon which the indictment was based says in substance that the official receiving a prohibited deposit shall be deemed guilty of embezzlement. Section ⁷⁴ ~~72~~ of chapter 38 (Cahill's Ill. Rev. Stats. 1933, chap. 38, ¹⁸⁶ ~~sec. 72~~) in substance provides that one embezzling property which may be deemed the subject of larceny shall be guilty of larceny. The charge of duplicity cannot, therefore, be sustained.

In the amendment to the act of 1879, upon which the indictment is based, the legislature ^{inserted} the words, "or its knowledge," and defendants argue that these words should have been averred in the indictment, and that the failure to do so constituted a material defect. "Its" knowledge could refer only to the corporation. The knowledge of the officers is charged in the indictment, and their knowledge by necessary inference would include knowledge on the part of the corporation as a unit.

A more serious question is raised by the contention that the act upon which the indictment is based is not applicable to these defendants who were only directors and held no other positions with the corporation. These defendants are Hartray and Castle. Defendants point out that the statute does not name directors as persons subject to prosecution thereunder; that the duties of directors are clearly distinguishable from those of officers; that a director without special authority cannot employ or discharge

were generalized. Defendant says that if these statements are con- sidered an essential part of the indictment, it charges not only but several offenses, and that these charges are redundant to the general charge. He holds the offenses are merely surplusage. Defendant also says that the indictment improperly charges defendants were guilty of both embezzlement and larceny, making the indictment bad for duplicity. The point was not raised in the official court upon the motion to quash, and we think defendants cannot be heard to urge it now. However, the statute upon which the indictment was based says in substance that the official re- ceiver is deemed guilty of larceny if he converts the property of the corporation. Section 44 of Chapter 88 (Gallie's 111. Rev. Stat. 1935, Chap. 88, Sec. 44-45) in substance provides that one embezzling property which may be deemed the subject of larceny shall be guilty of larceny. The charge of duplicity cannot, therefore, be sustained. In the amendment to the act of 1899, upon which the indict- ment is based, the legislature inserted the words, "or the knowl- edge," and defendant argues that these words should have been inserted in the indictment, and that the failure to do so constitutes a material defect. "It is" knowledge could refer only to the de- fection. The knowledge of the officers is charged in the indict- ment, and that knowledge is necessary to constitute the offense. Knowledge on the part of the corporation as a whole. A more serious question is raised by the contention that the act upon which the indictment is based is not applicable to those defendants who were only directors and held no other positions with the corporation. These defendants are Hartley and Gallie. It is pointed out that the statute does not name directors as persons subject to prosecution thereunder; that the duties of di- rectors are clearly distinguishable from those of officers; and that directors cannot employ or discharge

employees, receive or sign for a deposit, sign a cashier's check or letter of credit, make purchases, sign a lease or contract or perform any ministerial act. They point out that a trust officer who is a director is not generally accepted as the proper person to execute a deed in behalf of the corporation, or to make a similar conveyance of its property in its behalf. Defendants also say that the Banking Act (Canill's Ill. Rev. Stats. 1933, ~~chap.~~ ^{sec.} 16^(a)) clearly and carefully distinguishes between directors of a bank and officers of a bank. They say that directors are considered as a group rather than as particular individuals; that they serve as managers and are elected by a majority vote of the shareholders; that a president having been elected, they appoint officers to carry on the business of the bank; that they make by-laws, employ help, etc. Directors must be stockholders, but this is not true of the officers. The directors under the law must take and subscribe to an oath. Officers are not required to do so. The bank would cease to operate without officers, but failure to elect a board of directors does not have that effect. The statute, it is pointed out, provides only two ways in which an incorporated bank may discontinue business; (1) by direction of the stockholders, and (2) by order of the Auditor of Public Accounts as provided in section 11 of the Banking act.

The question does not appear to have ever been decided by any of the Appellate courts or the Supreme court of this State. However, in response to a request of the State's attorney of Greene county, the then attorney General of this State, Oscar Carlstrom, on January 5, 1932, rendered a written opinion on the question, which points out that since the enactment of the banking statute, private banks have been practically abolished; that the statute does not specifically name directors as amenable thereto, and that no definition of the word "officers" appears in the statute. The question therefore arises whether directors are embraced within the

employees, executive or agent for a business, with a question of control in
latter of credit, with a business, with a least on contract or business
any substantial part. They point out that a bank officer who is in a
director is not generally accepted as the proper person to exercise
a bank in behalf of the corporation, or to make a final conveyance
of its property in its behalf. Defendant also says that the banking
act (Banking Act, 1934, ch. 110, sec. 101) requires that a bank
business between directors of a bank and officers of a bank.
They say that directors are considered as a group rather than as
particular individuals; that they serve as managers and are elected
by a majority vote of the shareholders; that a president having been
elected, they appoint officers to carry on the business of the bank;
that they make by-laws, subject to the act. Directors must be stock-
holders, and this is not true in the statute. The directors prefer
the law must take and subscribe to an oath. Officers are not re-
quired to do so. The bank would cease to operate without officers,
but failure to elect a board of directors does not have that effect.
The statute, it is pointed out, provides only two ways in which an
incorporated bank may appoint directors: (1) by election of the
shareholders, and (2) by order of the holder of a stock certificate as
provided in section 11 of the statute.
The statute does not require in any way that a bank
may of the holders of the stock of the bank.
However, in response to a request of the state's attorney at Rome,
Georgia, the state attorney General of this state, upon application
on January 5, 1935, rendered a written opinion on the question,
which points out that since the enactment of the banking statute,
Georgia banks have been practically abolished; that the statute does
not specifically name directors as managers, and that no
definition of the word "officers" appears in the statute. The ques-

general meaning of the word "officers." The question in the last instance is one of legislative intention. There is no direct authority on the question in the cases, and the statute must therefore be construed in the light of the general rules by which such statutes are construed.

Bouvier's Law Dictionary defines an officer as one "who is lawfully invested with an office." The legislature in this and similar statutes seems to have distinguished between a director and an officer of a banking corporation. Thus in section 4 of chap. 16^{re. 12} (Cahill's Ill. Rev. Stats. 1933, chap. 16^{re. 12}, sec. 4) where the offense of making a false statement to a bank examiner is defined, the language used is "any officer, director or employee" who shall, etc. In section 5, which authorizes the withholding of a certificate on account of the unsatisfactory character of persons connected with the bank, the language also differentiates between an officer and a director, being "any officer or director, elected or appointed," etc. Again, paragraph 63 of the Criminal Code, which forbids a savings bank loaning to any officer or officers of such bank, provides for punishment only for such officer or officers without naming any other class. In section 3 of chap. 16^{re. 12}, a distinction is recognized between officers and directors, the statute providing that the stockholders shall hold a meeting for the determination of the number and election of directors to serve as managers and to serve until their successors are qualified. Sec. 4 of the same act provides that "the directors so elected" may proceed to organize and may appoint "such other officers as the by-laws may provide" and fix their salaries, etc. Section 8 of the act provides in substance that no bank or banking association organized under this act and "no officer, director or employee thereof" shall make any loan or gratuity, etc.

It would seem from a consideration of these sections of the statutes that the legislature at all times recognized the distinc-

There is no question in the mind of the General that the word "officer" is a term of art, and that it is not to be construed in the light of the general rules by which words are construed.

[illegible]

tion between officers and directors, in regard to the manner in which they were to be chosen, the duties which they are called upon to perform and the sources from which their various powers are derived. The General Corporation Act also seems to recognize this distinction between directors and officers in the organization of private corporations, as appears from an examination of sections 15 and 22 of that act. It provides in substance that the directors shall be elected by the subscribers to the stock after timely notice; that these directors shall within ⁶⁰ ~~sixty~~ days after incorporation meet, elect officers, adopt by-laws and transact such other business as may come before them; that the officers of the corporation shall consist of a president, secretary and treasurer and such other officers as shall be determined by the directors.

Whether the by-laws of the City State Bank provided for officers other than those named is not disclosed by the record. The parties here have cited numerous authorities from other states which are hardly persuasive in view of the fact that the questions considered in these cases arose upon statutes different from those which we must here consider. However, in Commonwealth v. Christian, 9 Phila. 556, it was held under a charter which provided "all corporate powers of the said company shall be exercised by a board of trustees, and such officers and agents as they may appoint," that the offices pertaining to a private corporation were defined in its charter and by-laws, and that the trustee of a life insurance company were not officers within the Pennsylvania Criminal Code. The by-laws there designated particularly who the officers should be but did not include the members of the board of trustees. The decision was placed upon the ground that the court was considering a statute which was highly penal. In a concurring opinion Judge Campbell said:

"Directors and trustees may be said to hold office in the corporation in a general sense, and may control and direct presi-

tion between directors and officers, in regard to the manner in which they were to be chosen, the duties which they are called upon to perform and the manner in which their various powers are exercised. The General Corporation Act also makes no recognition of distinction between directors and officers in the organization of their corporations, no provision for an investigation of directors and 22 of that act. It provides in substance that the directors shall be elected by the shareholders in the same manner as the officers, and that these directors shall retain their office after resignation, death, or removal, until the next election and until their successors are chosen. The officers of the corporation shall be elected at a meeting of a president, secretary and treasurer and such other officers as shall be determined by the directors.

Under the by-laws of the City of New York, which are provided for officers other than those named in the statute by the board of directors, have also numerous authorities from other states which are hardly persuasive in view of the fact that the question is presented in these cases upon a claim that the directors are not to be considered, however, in the same manner as the officers, as was held under a similar provision "all corporations of the said company shall be controlled by a board of directors, and such officers and agents as they may appoint," and the officers pertaining to a private corporation were defined in its charter and by-laws, and that the exercise of a life insurance company was not officers within the meaning of the statute.

The board were designated particularly and the officers should be and did not include the members of the board of trustees. The provision was based upon the ground that the board was exercising a power which was strictly general. In a subsequent opinion, the

dents and secretaries in the management of the business of the corporation. But in the transaction of such business with the public, the corporation generally speaks through its president and secretary. They are emphatically its officers."

¶ In U. S. v. Means, 42 Fed. 599, the court said that the question of being or not being an officer under the act there considered and similar acts, might depend on the very special circumstances of each case. In Brand v. Godwin, 8 N. Y. S. 339, it was held that a director was an officer within the meaning of a certain section of the laws of that State which provided that an officer should be liable for all the debts of the corporation where a report signed by him was false in a material representation, and this when read in connection with another section which required that the annual report should be signed by the president and a majority of the directors.

In 2 Fletcher's Cyc. of Corp. 19, it is said:

"Generally the officers of a corporation are enumerated in its charter or by-laws, and include a president, vice-president, secretary, treasurer and sometimes others." *he 7#*

In 7 Corpus Juris 545, it is said that as a general rule "the directors are not officers of the bank, and have no power individually to control its management; they can act only collectively as a board, and they are not individually agents of the institution."

No doubt, in a broad sense a director of a corporation may be considered as an officer of it, but as was said in State v.

Klichli, 53 Minn. 147:

"The words 'office' and 'officer' are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used."

¶ Thus in Forbett v. Eaton, 1 N. Y. S. 614, the majority of the court held that a director who had signed the financial report of a corporation which the law required him to sign was an officer within the meaning of the section. There was, however, a vigorous dissenting

that the corporation is the management of the business of the corporation. This in the transaction of such business with the world, the corporation generally appears through its president and secretary. They are unquestionably its officers."

In People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009, the court said that the question

of what is the nature of the office of the president and secretary is not a question of law, but a question of fact.

and similar cases. While it is true that the corporation is a legal entity, it is not a natural person.

In People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009, it was held

that a director was an officer within the meaning of a certain

section of the laws of that State which provided that an officer

should be liable for all the debts of the corporation where a re-

port signed by him was filed in a material representation, and

also when used in connection with another section which required

that the annual report should be signed by the president and a

majority of the directors.

In People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009, it is said:

"Generally the officers of a corporation are understood in the context of the laws, and include a president, vice-president, secretary, treasurer and sometimes others."

In People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009, it is said that as a general rule

"the directors are not officers of the bank, and have no power in-

dividually to control the management; they can act only collectively

as a board, and they are not individually agents of the institution."

So, in a broad sense a director of a corporation may

be considered as an officer of it, but as was said in People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009,

"the words 'officer' and 'offices' are terms of vague and

relative import, the meaning of which necessarily varies with the

context in which they are used, and to determine its correct

meaning in a particular instance, regard must be had to the intention of

the legislature and the subject matter in reference to which the terms

are used."

In People v. Board of Education, 131 N.Y. 211, 35 N.E. 2d 1009, it is said that a director who had signed the financial report of a cor-

poration which the law required him to sign was an officer within

opinion which said:

"The directors who signed the report are not made liable, in express terms, for any false statement made in it. The statute under which it is sought to make them responsible creates a liability which is penal and has been so declared, and is to be strictly construed. Bank v. Bliss, 35 N. Y. 412; Wiles v. Suydam, 64 N. Y. 173; Garrison v. Howe, 17 N. Y. 450; Arms Co. v. Barlow, 68 N. Y. 34; Printing Co. v. Beecher, 26 Bond, 48. Nothing therefore, to be taken by implication. The design of the statute was to punish the officers who sign the report, and who it must be assumed know more of the affairs of the corporation than the directors, and whose affirmation is therefore regarded as the most important, and required by law. Directors are not officers of these corporations, either in the popular or legal sense of the term by which they are designated, unless made so by the statute creating them."

4 The question has been considered under a statute similar to our own in the comparatively recent case of Coblentz v. State, 164 Md. 553, where an opinion was filed at the January Term 1933. The statute in that State declared it to be a misdemeanor for any "officer, clerk or employee" of a banking institution to accept a deposit when the institution was known to be insolvent, etc. It was held that directors of the bank who would ordinarily have control of the opening or closing of the bank were not included. The court said that although they were included in an enumeration of individuals in a preceding clause of the statute, they were omitted from this one. In a concurring opinion it was said: "The court has found that the statute does not include directors, and with that I entirely agree."

As already stated, there is no authority in this State precisely in point. The reasons we have summarized following largely the opinion of the attorney general compels the conclusion that it was not the intention of the legislature to include directors of the bank as persons who should be held criminally liable under the act. The reasons in brief are (1) that all the language of this and similar statutes indicates that wherever it was the intention that directors should be held to a personal responsibility, they were specifically named, while they are not named

here; (2) that the statute here to be construed creates an offense unknown to the common law, highly penal in its nature and therefore to be construed very strictly in favor of the one accused of the crime; (3) that in the source from which his power is derived and the duties cast upon him, the position of a director is in its nature essentially different from that of officers who are named as being liable to the penalties provided for violation of the act. It follows that the motion to quash the indictment as to William C. Hartray and Morrison H. Castle should have been allowed.

Defendants Stedman and Jarema insist that it is impossible to split up the indictment ^{le} into parts, and although they were officers of the City State Bank, that by reason of this defect the indictment should also be quashed as to them. We have considered the indictment. The charges that these defendants were directors could be eliminated without in any way affecting the indictment as to those who are averred to be officers. We therefore conclude that under well recognized rules the averment that Stedman and Jarema were directors is mere surplusage which may be disregarded and eliminated without in any way destroying the vitality of the indictment. Bishop on Criminal Law, 4th ed., sec. 478.

Defendants argue at length alleged errors by the court in the admission and exclusion of evidence. The record consists of nearly ^{4,000} ~~four thousand~~ pages, with hundreds of exhibits. It is quite impossible without unduly extending the opinion to notice every complaint in this respect. It is urged that the evidence was not confined to the bill of particulars and that exhibits were received without preliminary evidence as to their truth and accuracy. The brief of defendants contains three printed pages devoted to recitation by number of exhibits which it is averred were improperly admitted, because not referred to in the bill of particulars. The State replies that there was a supplemental bill of particulars and

here; (2) that the statute here to be construed creates an offense
unknown to the common law, highly penal in its nature and charac-
ter to be construed very strictly in favor of the one accused of
the crime; (3) that in the statute from which this power is derived
and the title and heading, the position of a director is in the
state essentially different from that of officers who are named
as being liable to the penalties provided for violation of the act.
It follows that the statute is unconstitutional as to directors.
Peterson and Morrison v. Cassie should have been allowed.
Defendants' motion and prayer being that it be made
to nullify the indictment, this court, and although they were of-
ficers of the City State Bank, that by reason of this defect the
indictment should also be annulled as to them. We have considered
the indictment. The charges that these defendants were accessory
could be eliminated without in any way affecting the indictment
as to those who are averred to be principals. As matters standing
that matter will be disposed of in the manner that we have
stated and this case is now ready for judgment and we therefore
and eliminate without in any way affecting the validity of the
indictment. Rights in Criminal Law, 1st ed., 1878.
Defendants' motion is hereby denied with costs by the court in
the relation and exclusion of evidence. The record consists of
several large documents, with hundreds of exhibits. It is
quite impossible to make a list of the exhibits in order
very material in this respect. It is urged that the evidence
was not confined to the bill of particulars and that exhibits were
received without preliminary evidence as to their truth and accuracy.
The trial of defendants contains three printed pages devoted to
explanation by number of exhibits which is in answer to the
objection, because not referred to in the bill of particulars. The
state prays that there was a supplemental bill of particulars and

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that this supplemental bill, after enumerating particular matters on which evidence would be offered, informed defendants that the State intended to offer evidence on the liquidation of all loans in the bank, and it is urged that defendants are now precluded because they did not ask for a more specific bill of particulars in that regard. The answer is not sufficient. In 49 Corpus Juris 630, the author states the general rule to be that "a statement accompanying particulars furnished that the party does not intend to limit its proof to such particulars will be disregarded." To the same effect are DeGumpons v. Equitable Trust Co., 206 N.Y.S. 130; People v. Parker, 355 Ill. 258. See also U. S. v. Adams Express Co., 119 Fed. 240; U. S. v. Pierce, 245 Fed. 888.

In their reply brief defendants call attention to the fact that there was no statement of liabilities of the bank set forth in the bill of particulars and insist that the absence of such statement results in failure to state essential facts necessary to be alleged. They cite People v. Parker, 355 Ill. 258. In that case, which was a prosecution for embezzlement, the court said:

"There is no charge in the amended or supplemental bill of particulars that any of the checks, or the proceeds thereof, were obtained by the defendant for the ostensible purpose of opening twelve offices for the sale of securities of the trust company. Where a bill of particulars has been filed, the consideration of the case against the defendant must be limited to the charges as stated in the bill of particulars. (Township of Lovington v. Adams, 232 Ill. 510; McDonald v. People, 126 id. 150.)"

A very serious allegation of error concerns the admission in evidence of the People's exhibit 556, which was an order of the Circuit court of Cook county, appointing a receiver for the City State Bank, which contained the usual verbiage of such orders. The order was signed by Judge William V. Brothers. It was produced upon the trial of the cause by a deputy clerk of the Circuit court, who identified it. The order recites that the court had jurisdiction; that the Auditor of Public Accounts had made an examination of the financial condition of the bank; that among the resources of the bank were

on which evidence would be offered, introduced evidence that the
State intended to offer evidence on the falsification of all loans in
the bank, and it is urged that defendant was not prejudiced because
they did not see for a more specific bill of particulars in that
regard. The answer is not sufficient. In 42 Cases 1015 65, the
author states the general rule to be that "a statement summarizing
particulars furnished that the party does not intend to limit its
proof to such particulars will be disregarded." In the same effort

the defendant v. Federal Trust Co., 200 U.S. 133; Lewis v.
United, 100 Ill. 221. See also U.S. v. Edgar, 220 Ill. 200.
U.S. v. Miller, 200 Ill. 200.

to limit their proof defendant was not entitled to the law
that there was no intention of falsification of the bank's loans in
the bill of particulars was stated that the answer of such defendant
should be limited to those essential facts necessary to be alleged.
U.S. v. Lewis, 200 Ill. 200. In that case, the court said:
"The court said:

"There is no charge in the amended or original bill of
particulars that any of the checks, or the proceeds thereof, were
obtained by the defendant for the purpose of obtaining a loan from
the bank for the sale of securities in the stock market."
Where a bill of particulars was filed, the defendant was asked
what amount the defendant was liable to the bank on the
in the bill of particulars. U.S. v. Lewis, 200 Ill. 200.
U.S. v. Miller, 200 Ill. 200.

A very serious allegation of every defendant the defendant in
affidavit of the bank's assets was made at the
defendant's proof by such county, appearing a receipt for the bill of
bank, which contained the usual receipt of such nature. The answer
was signed by John William V. Edwards. It was returned upon the
trial by the court as a receipt from the bank's assets, the bank
then is. The state further that the court had jurisdiction; that the
advice of public accountants had made an examination of the financial
condition of the bank; that among the resources of the bank were

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assets, loans, etc., aggregating \$1,036,277.29, which were considered doubtful and worthless assets; that the shortage in resources was in excess of the capital stock, surplus and undivided profits; that the resources of the bank available for liquidation and payment of the amount due depositors and creditors were so depreciated that the bank had become impaired to the extent that it could not be made good; that the examination disclosed the bank was conducted in an unsafe manner; that to prevent further loss and depreciation of the resources of the bank, the Auditor of Public Accounts, pursuant to the statutes, on November 2, 1929, took possession of the bank books and records and because of the condition therein set forth, on November 11, 1929, appointed Abel Davis receiver; that the action of the auditor was approved and confirmed. Mr. Lewis, an attorney for defendants, objected to the introduction of the exhibit, but the court replied, "They may be admitted." When Mr. Wright, also attorney for the defense, stated he wished to make a further objection, the court said: "The record may register your objection. The court has ruled on it." Mr. Wright then stated that he wanted to add to the objection that defendants were not parties to the proceeding in which the order was entered. The court replied: "You do not have to make at this time any assignment of error. You may do that when you prepare your bill of exceptions." Thereupon Mr. Wright again stated that the objection was on the ground that the parties to this suit were not parties to the suit in which the order was entered. The objection was overruled by the court. Mr. Wright continued, saying that the exhibit was admitted without an opportunity to cross-examine until after it had been read in evidence. The record discloses:

Q "The Court: Do you want to cross-examine?

Q "Mr. Wright: Not now, I am doing something else.

Q "The Court: I am satisfied you did not care to in the first place.

Q "Mr. Wright: If your Honor has overruled the objection I have a motion to make.

Q "The Court: I do not know what you are going to do. You are doing so many things at once, -- the objection is overruled, and the Court suggests that you go on to

assets, loans, etc., aggregating \$1,086,877.25, which were owned
and controlled and without assets; that the charge in respect
was in excess of the capital stock, surplus and undivided profits;
that the resources of the bank available for liquidation and payment
of the amount due depositors and creditors were so depleted that
the bank had become impaired to the extent that it could not be made
good; that the examination disclosed the bank was conducted in an
unusual manner; that to prevent further loss and deterioration of the
resources of the bank, the Auditor of Public Accounts, pursuant to
the statutes, on November 2, 1932, took possession of the bank books
and records and because of the condition therein set forth, on Novem-
ber 17, 1932, appointed Abel Davis receiver; that the action of the
auditor was approved and confirmed. Mr. Davis, an attorney for the
receiver, objected to the introduction of the exhibit, but the court
refused, "they may be admitted." When Mr. Wright, also attorney for
the defendant, stated he wished to make a further objection, the court
said: "The record may register your objection. The court has ruled
on it." Mr. Wright then stated that he wanted to add to the objec-
tion that defendant were not parties to the proceeding in which the
order was entered. The court replied: "You do not have to make an
objection on the ground that the parties to this suit were not
parties to the suit in which the order was entered. The objection
was overruled by the court. Mr. Wright submitted, saying that the
objection was stated without an opportunity to be heard and that
it had been heard in evidence. The record disclosed:

"The Court: Do you want to cross-examine?
"Mr. Wright: Not now, I am doing something else.
"The Court: I am satisfied you did not want to in the first
place.
"Mr. Wright: If your Honor has overruled the objection I
have a motion to make.
"The Court: I do not know what you are going to do. You
are doing so many things at once, -- the objection is
overruled, and the Court suggests that you go on to

something else.

"Mr. Wright: Now we move the Court for the sake of the record to instruct the jury to disregard P. Ex. 556.

"The Court: And that motion is denied.

"Mr. Wright: Insofar as it contains any recitals concerning the condition of the bank.

"Mr. O'Hara: The State has no objection to the jury being instructed to disregard those portions of the decree which make reference to the condition of the bank. The State is offering it for the purpose of showing the appointment of the receiver.

"The Court: The authority upon which this receiver acts is absolutely admissible in this record.

"Mr. Wright: If the Court please, I am simply trying to keep a record of the proceedings.

"The Court: All right, that is very nice of you, suave and everything else."

In the course of the trial the State's Attorney, apparently realizing to some extent the seriousness of the error, called the attention of the court to the exhibit and said that the State joined in the motion that the jury be instructed to disregard parts of the order. The Court said, "I thought I did that." Mr. O'Hara replied, "No." The Court then said that if there was any question about not having done it, he would do it again, and that he understood that the records were introduced simply for the purpose of showing the appointment of the receiver and nothing else, adding, "The jury will not regard anything further in this order, it is just to show the appointment of the receiver by the Court."

The exhibit, however, was not withdrawn. No further or other instruction appears to have been given to the jury with reference to it. It is apparent that the admission of this exhibit was grave error. In the first place, defendants were not parties to the proceedings in the Circuit court in which the receiver was appointed, and the order was not binding upon them in any way. In the second place, the order recites conclusions of fact by the State Auditor, who apparently was not sworn and, indeed, it does not appear that he testified. In the third place, the order purported to find the ultimate issue which the jury in the cause was to determine. In the fourth place, the Circuit court, as the Supreme court thereafter held, was wholly without jurisdiction to enter the order. Webb v.

everything else."
"The Court: All right, that is very nice of you, please and
a record of the proceedings."
"The Court: If the Court please, I am simply trying to keep
the matter simple in this regard."
"The Court: The matter is upon this point, and it is
the subject of the question of the evidence."
"The Court: The matter is upon this point, and it is
the subject of the question of the evidence."
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In the course of the trial the State's attorney, representing
realizing to some extent the importance of the error, called the
attention of the court to the exhibit and said that the State joined
in the motion that the jury be instructed to disregard parts of the
evidence. The State said, "I believe I am right, my learned friend."
"The Court: The State has said that it there was any question about not
having done it, he would do it again, and that he understood that
the records were introduced simply for the purpose of showing the
agreement of the receiver and nothing else, saying, "The jury
will not regard anything further in this order, it is just to show
the agreement of the receiver by the State."

The exhibit, however, was not withdrawn. No further or other
instruction appears to have been given to the jury with reference to
it. It is apparent that the admission of this exhibit was purely
error. In the first place, defendant was not parties to the pro-
ceedings in the trial court in which the evidence was introduced,
and the order was not binding upon them in any way. In the second
place, the order is not binding on the jury in the trial court,
and especially was not sworn and, indeed, it does not appear that he
participated. In the third place, the order purported to bind the al-
ready having which the jury in the case was to determine. In the
fourth place, the State's court, as the Supreme Court thereafter
said, was really without jurisdiction to make the order. That is

Marozas, 268 Ill. App. 338; People v. Shurtleff, 353 Ill. 248. The fact is that the appointment of a receiver was at no time an issue in the trial. It was conceded by all parties, and the suggestion that the order was introduced on that account is merely pretence. It was impossible for any one of the defendants to have a fair trial with this order before the jury, and especially when considered in connection with the remarks of the trial judge with reference to it. The State does not seriously contend that the ruling of the court in this respect was not erroneous. The ruling that this order might go to the jury was, we hold, reversible error.

Defendants further contend that the evidence failed to prove either that the bank was insolvent at the time the deposit was received, or that they, or any one of them, if it was insolvent, had knowledge of that fact. This contention presents the ultimate issue of fact determinative of the case. As we understand the law it was essential to a conviction of defendants that the State should produce evidence which would show (1) that defendants were officials of the City State Bank, to whom the statute was applicable; (2) that a deposit was received from Louise Green November 2, 1929; (3) that at the time it was received the bank was in fact insolvent; (4) that defendants knew at that time that it was insolvent; (5) that the money on deposit, or some part of it, was lost to the depositors; (6) that all of the above facts must be made to appear beyond a reasonable doubt.

In addition to cases already cited, we understand the opinions of the Supreme court in People v. Clark, 329 Ill. 104; People v. Gould, 345 Ill. 288; People v. Hammond, 357 Ill. 132, sustain this interpretation of the law. In People v. Clark, supra, the court, after citing the statute and stating different definitions of insolvency, none of which had been given in a case where the solvency of a bank was in issue, continued:

"In Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L.R.A. (2d.) 444, the Supreme Court of Wisconsin had occasion to consider the meaning of the word 'insolvent' in an act similar to the one upon which the indictment in the case at bar is predicated. The trial judge had charged the jury that whether the bank was insolvent on the particular days material to the case turned on whether it had sufficient assets to meet its liabilities in the ordinary course of business. The Supreme Court said that under insolvent and bankrupt laws, by the theory of which the debtor should suspend and take or submit to such measures for the protection of creditors as insured equality of treatment the trial court's view was correct; that the limited meaning of the word 'insolvent' applied in the administration of such laws was not the common, popular or general meaning of the term, which suggested merely a substantial deficit of assets to meet liabilities; that the lending of all save a comparatively small portion of a bank's deposits was inherent in the conduct of the banking business and that this condition was recognized by law; that it would be unreasonable to punish criminally, under a statute of the character here invoked, persons engaged in the banking business whenever their competency to pay all depositors in the usual course of business is challenged, regardless of their competency to pay them all ultimately. The court held that the term 'insolvent,' as used in such a statute, does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business, but that the term means insolvent in the broad general sense of a deficit of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities; and that a bank is insolvent, within the meaning of such a statute, when the cash value of its assets realizable in a reasonable time, in case of liquidation by its proprietors, as ordinarily prudent persons would generally close up their business, is not equal to its liabilities, exclusive of stock liabilities. This definition of the word 'insolvency' as employed in the connection stated, expresses the common, ordinary meaning of the word, and for that reason must be taken to have been intended by the General Assembly in the enactment of the statute upon which the instant indictment is based.

"Liquidation of a bank in insolvency proceedings is inevitably attended with losses, which often fall upon the depositors. The assets of a going banking concern are regarded very differently from the same assets after the bank has been forced into liquidation. The change of situation depreciates the value of the bank's property to a marked degree."

"It was therefore essential for the State to prove that on November 2, 1929, when the alleged deposit was received the City State Bank was in fact insolvent as defined in People v. Clark.

November 2, 1929, when the supposed deposit was received and the bank closed, the condition of the bank as shown by the books was as set forth in People's Exhibit 361, which was as follows:

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C. K. C.

CITY STATE BANK OF CHICAGO
STATEMENT OF CONDITION AS OF
NOVEMBER 2, 1929.
RESOURCES.

| | |
|------------------------------------|----------------|
| Loans and Discounts..... | \$2,075,223.15 |
| Real Estate Loans..... | 312,732.72 |
| Overdrafts..... | 645.89 |
| U. S. Government Securities..... | 20,550.00 |
| Other Stocks and Bonds..... | 997,500.00 |
| Stock Affiliated Corporations..... | 462,000.00 |
| Bonds Reserved Under P.P.P..... | 40,400.00 |
| Furniture and Fixtures..... | 28,299.76 |
| Other Real Estate..... | 16,871.00 |
| Due from Banks..... | 132,143.67 |
| Exchange for Clearings..... | 163,594.01 |
| Cash..... | 31,462.16 |
| Cash Items..... | 12,774.78 |
| Items in Transit..... | 6,313.08 |
| Interest Earned Not Collected..... | 48,323.21 |
| Accounts Receivable..... | 168,652.62 |
| Revenue Stamps..... | 49.02 |
| Deferred Charges..... | 4,292.60 |
| Adjustments..... | 3,364.50 |

\$4,525,192.17

LIABILITIES.

| | | |
|--------------------------------------|--------------|--------------|
| Capital Stock..... | \$400,000.00 | |
| Surplus..... | 200,000.00 | |
| Undivided Profits..... | 1,883.33 | |
| Reserve Accounts..... | 20,489.14 | \$622,372.41 |
| Demand Deposits..... | 1,873,693.53 | |
| Time Deposits 1..... | 1,095,489.24 | |
| Public Funds on Deposit..... | 400,500.00 | |
| Due to Banks..... | 59,017.28 | |
| Certificates of Deposits..... | 23,020.00 | |
| Cashier's Checks..... | 78,210.32 | |
| Christmas, Insurance and Vacation | | |
| Club Deposits..... | 106,525.12 | |
| Deposits on Bonds Purchased..... | 16,947.80 | |
| Deposits Collateral Trust Notes..... | 3,336.70 | |
| Trust Department Funds..... | 61,207.54 | |
| Bills Payable..... | 155,000.00 | |
| Accounts Payable..... | 18.15 | |
| Premium Accounts..... | 18,132.63 | |
| Interest Collected (Not Earned)..... | 7,768.93 | |
| Subscription Account..... | 510.70 | |
| Teller's Difference Account..... | 220.35 | |
| Adjustment Account..... | 3,219.41 | |

\$4,525,192.17"

In determining the question of insolvency the items of capital stock, surplus, undivided profits and reserve accounts amounting to a total of \$622,372.41 should be excluded from liabilities. People v. Clark, 329 Ill. 104. Subtracting the amount

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of capital stock, surplus, etc., which was \$622,372.41, the amount of book liabilities, leaves \$3,902,319.76 net liabilities as against total resources of the bank, as shown by the books, of \$4,525,192.17. In order to prove insolvency it was obviously necessary for the State to show that the value of all the assets of the bank on that date was less than the total net liabilities. The State assumed the burden of so proving. It is in consideration of this question that the damaging character of the ex parte order of the circuit court, which, as we have already seen, was erroneously admitted in evidence, appears.

However, independently of that order, the State undertook to produce the necessary proof. Its evidence was directed principally toward showing the worthlessness of two items which appeared in the resources: (1) loans by the bank to the trustees of the Co-operative Society of America to the amount of \$463,693.07; (2) an item consisting of 5010 shares of capital stock of the City State Safe Deposit Company, which was the owner of the building in which the bank was situated, this stock being carried on the books of the bank at the value of \$462,000, which represented the amount actually paid for the stock at the time it was purchased.

It is quite impossible to properly weigh the evidence in regard to these items without bearing in mind the relationship the bank sustained to various other organizations and corporations and particularly to the Cooperative Society of America. This Society was a common law trust organized by one Harrison Parker about 1922. All its business was directed and its assets held by trustees. The members, of whom there were as many as 90,000, held beneficial interests in the trust, and the trustees owned and controlled various enterprises conducted in the interest of the beneficiaries. One of these enterprises was this City State Bank of Chicago. The Society held and owned all the stock with the exception of qualifying shares

of capital stock, mortgages, etc., which was \$237,572.11, the amount of book liabilities, leaves \$2,902,182.70 net liabilities as against total resources of the bank, as shown by the books, of \$4,339,754.81.

In order to prove insolvency it was obviously necessary for the

State to show that the value of all the assets of the bank on that

date was less than the total net liabilities. The State assumed

the burden of so proving. It is in consideration of this question

that the hanging character of the ex parte order in the Shaw

case, which, as we have already seen, was extremely doubtful in

character, appears.

However, independently of that order, the State assumed

to sustain the ex parte order. The evidence was divided into

three parts showing the weaknesses of the State's case.

In the first part: (1) Items of the bank in the hands of the

operative Society of America to the amount of \$427,223.67; (2) an

item consisting of 100 shares of capital stock of the City State

Bank, which was the subject of the bill in the

case, and which, this stock being owned by the bank, was

not at the time of the order, which represented the bank's liability

to the State at the time it was made.

It is further suggested as properly within the evidence in

support of this item should be taken into consideration the

fact that the bank's assets were not liquid and convertible into

cash, and that the bank's assets were not liquid. This Society

was a common law trust organized by one Harrison Turner about 1922.

All the business was directed and its assets held by Harrison. The

members, of whom there were as many as 50,000, held beneficial in-

terests in the trust, and the trustees owned and controlled various

enterprises connected in the interest of the beneficiaries. One of

these enterprises was the City State Bank of Chicago. The Society

held and owned all the stock with the exception of parading shares

held in the names of persons acting as directors, and even these shares were in the possession of the Society, being held as collateral to notes. Mr. Stedman, however, paid \$165 cash for the ¹⁰ten shares of bank stock which he held, amounting to the total sum of \$1650, and he has, since the bank closed, paid a stockholders' liability thereon of \$1000. None of the defendants took any part in the organization of the Cooperative Society of America, and certificates of beneficial interest were not sold after they became trustees. Their connection with the Society came about under these circumstances: Up to July 1, 1921, the Society had about 90,000 subscribers holding beneficial interests for which they had either paid or agreed to pay \$25,000,000. In 1922, proceedings in chancery and in bankruptcy were pending against the trustees of the Society in the Federal court of Chicago before Judge Evans. To prevent the ruin which seemed to impend in case of liquidation a conference was suggested with the view to settlement. As a result some of the trustees resigned and at the suggestion of the Judge, Stedman was offered and accepted appointment as trustee. Another trustee named at that time was Abel Davis, who later resigned and was succeeded by Mr. Wilkins of the Central Trust Co. The salary Stedman was to receive was suggested by the Judge and accepted by Stedman. At this time the book value of the beneficial interests was \$5 a share. At the time the bank was closed the book value of these interests was \$37 a share.

Besides this bank the Society owned and operated a number of other companies. These were the City ^{State} Safe Deposit Co., the City State Co., the City State Investment Co., the Randolph Drug Co., the Randolph Building Corp., and Peoples Life Insurance Co. The Wells Building Corp. and the Randolph Building Corp. were merged with the City State Deposit Co., and the assets of these companies were transferred to it February 1, 1927. The loans of the bank

half in the names of persons acting as directors, and even these
names were in the possession of the Society, being held as of
interest to notice. Mr. Johnson, however, paid \$1500 each for the
shares of bank stock which he held, amounting to the total sum of
\$1500, and he has, since the bank closed, paid a subscription
towards the redemption of \$1500. Some of the statements took my part
in the organization of the Cooperative Society of America, and con-
sideration of beneficial interests were not made after they became
frustrated. Their connection with the Society came about under these
circumstances: Up to July 1, 1921, the Society had about 90,000
members, and had beneficial interests in which they had either
paid or agreed to pay \$28,000,000. In 1922 proceedings in bankruptcy
and in bankruptcy were pending against the trustees of the Society
in the Federal Court of Chicago before Judge Wynn. To prevent the
trust which seemed to depend in case of liquidation a conference was
conducted with the view to settlement. As a result some of the
trustees resigned and at the suggestion of the Judge, Johnson was
elected and accepted appointment as trustee. Johnson had been
at that time was Abel Davis, who later resigned and was succeeded
by Mr. William of the Central Trust Co. The salary Johnson was to
receive was suggested by the Judge and accepted by Johnson. At this
time the book value of the beneficial interests was \$4 a share. At
the time the bank was closed the book value of these interests was
but a small fraction of that.

Johnson this bank the Society owned and operated a number of
other companies. These were the City State Deposits Co., the City
State Building Corp., and the Chicago Building Corp. were merged
with the City State Deposits Co., and the assets of these companies
were transferred to it February 1, 1927. The income of the bank

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to the Society are said by the State's Attorney to amount to \$338,198.42. The statement, while nominally true, is in fact inaccurate and misleading. Mr. Bailey, auditor for the State's Attorney, testified as the State's witness and said that \$67,500 of this amount represented a loan from the bank to the Society and that additional loans in the sum of \$6,000, \$8,000, \$11,700 and \$3,814.42, making a total of \$97,000, were direct loans for the benefit of the Society. The rest of the indebtedness, which amounted to more than \$200,000, for the most part represented loans made for the bank through Guy L. Bush to George Polo. Mr. Nelson, Auditor of Public Accounts of the State, suggested that these loans to Polo should be additionally secured by the notes of the Society which were substituted therefor. As a matter of fact, the collateral given at the time the loans were made to Polo remained in the bank. His note for \$67,500 was secured by 8000 shares of the stock of the Peoples Life Insurance Co., for which the Society had paid \$30 per share, representing an investment by it of \$240,000. The notes provided that the collateral should stand as security for any and all indebtedness, so that the \$97,000 which Polo owed was secured to the bank by these 8000 shares of stock in the Peoples Life Insurance Co., and was further secured by the note of the Cooperative Society of America.

There was evidence in behalf of defendants tending to show that additional security which Polo left with the bank was reasonably worth more than \$300,000. All these securities were behind this particular obligation of the Cooperative Society to the Bank. The evidence also shows that at this time the Society owned adjusted notes due from its members in the sum of \$1,098,616.91; that about 25,000 of these notes were for less than \$200 each, and that in addition the Society owned accounts due from members to the amount of \$4,195,738.74. As defendants point out, ten per cent collections of

to the Society and said by the attorney in answer to
the question, while necessarily true, is in fact the
substance and meaning. Mr. Bailey, auditor for the State's At-
torney, testified as the State's witness and said that \$87,500 of
this amount represented a loan from the bank to the Society and that
additional loans in the sum of \$5,000, \$5,000, \$11,700 and
\$2,514.43, making a total of \$89,700, were direct loans for the
benefit of the Society. The rest of the indebtedness, which amounted
to more than \$200,000, for the most part represented loans made for
the bank through Guy A. Bush to George Fols. Mr. Folsom, auditor
of Public Accounts of the State, suggested that these loans in fact
should be additionally secured by the notes of the Society which
were submitted in support. As a matter of fact, the certificates given
at the time the loans were made to this Society in fact were, the
same as the \$87,500 was secured by such notes of the bank of the
Peoples Life Insurance Co., for which the Society had paid \$50 per
share, representing an investment by it of \$245,000. The notes pro-
vided that the collateral should stand as security for any and all
indebtedness, so that the \$87,500 which Fols owed was secured to the
bank by these \$200 shares of stock in the Peoples Life Insurance Co.,
and was further secured by the notes of the Cooperative Society of
Iowa.

There was evidence in behalf of defendants tending to show
that said notes were actually sold to the bank and were received by
the bank as collateral for the loan. The bank's books show this
particular addition of the Cooperative Society to the bank. The
witness also shows that at this time the Society owned adjusted
notes for its members in the sum of \$1,028,012.91; that about
\$2,500 of these notes were for less than \$500 each, and that in 1911
the Society owned accounts due from members to the amount of
\$4,125,725.74. As the bank paid out, and the bank's collection of

these accounts would have more than liquidated the entire indebtedness of the Society to the bank.

Mr. Edward Tudor, employed by Joseph N. Optner, who became receiver for the Society, testified as a witness for the People. His testimony is to the effect that if given a reasonable time he could have realized at least 50 per cent on these notes and accounts. As defendants point out, he being the witness produced by the State, the State was bound by his testimony. *Thompson v. State*, 174 Ill. 229. At any rate, his evidence seems to be uncontradicted.

Mr. Edward Kesler, formerly one of the trustees of the Society, testified (and his testimony is not contradicted) that from 1922 to 1929 the members of the Society had paid ^{on} their membership contracts \$1,600,000, and that one year preceding the closing of the bank these members had paid in approximately \$300,000 on subscriptions to the capital stock of the City State Co. in addition to the amount paid during that year on their membership subscriptions. The City State Co. was a corporation organized, as the State contends, for the purpose of removing slow assets from the bank, but, as the evidence for defendants tends to show, with the design and ultimate purpose of taking over all the assets of the Cooperative Society of America to the end that the holders of beneficial interests in it should receive stock instead of beneficial certificates in the trust. The City State Co. had in fact, however, paid into the bank about \$145,000, which had been used in taking out slow loans. It had also donated to the bank \$50,000 in cash which was placed in the undivided profit account. Its entire common stock was owned by the Society, and the amount of money which it turned over to the bank indicates it was not used in any way for the purpose of taking money out of it but rather for the purpose of assisting it.

The City State Co. also paid out about \$80,000 to the

these accounts would have been furnished the entire information
ness of the Society to the bank.
Mr. Edward Keller, employed by Joseph H. Ogden, was known
receiver for the Society, testified as a witness for the Society.
His testimony is to the effect that it is a corporation and he
could have received at least 50 per cent of the profits and so-
cieties. As testimony point out, he being the witness mentioned by
the State, the State was bound by his testimony.
174 Ill. 200. At any rate, his evidence seems to be uncontradicted.
Mr. Edward Keller, formerly one of the officers of the So-
ciety, testified (and his testimony is not contradicted) that from
1882 to 1888 the members of the Society had paid their membership
contracts \$1,000,000, and that one year preceding the closing of
the bank these members had paid in approximately \$300,000, and on the
receipts to the central bank of the City State Co. in addition
to the amount paid during that year on their membership subscrip-
tions. The City State Co. was a corporation organized in the
State of Illinois, for the purpose of removing the assets from the
bank, but, as the evidence for defendant tends to show, with the
design and mischievous purpose of taking over all the assets of the
Cooperative Society of America to the end that the holders of
beneficial interests in it should receive stock issued of benefi-
cial certificates in the bank. The City State Co. had in fact,
however, paid into the bank about \$15,000, which had been paid
in taking out the loans. It had also borrowed of the bank \$20,000,
in each which was placed in the unutilized profit account. The un-
five common stock was owned by the Society, and the amount of
money which it turned over to the bank indicates it was not used
in any way for the purpose of taking money out of it but rather
for the purpose of assisting it.
The City State Co. also paid out about \$20,000 to the

City State Safe Deposit Co. in order to meet taxes and interest on the bank building during the period the building was being constructed. The bank owned 51 per cent of the stock in the building company and therefore received 51 per cent of the benefit of this payment.

The State's Attorney suggests that the Circuit court refused to permit the receiver of the C. S. of A. to collect accounts from members because of the uselessness of the effort. The evidence hardly justifies this conclusion. On the contrary, the closing of the bank and the appointment of receivers for the corporations affiliated with it had destroyed and dissipated the assets of the Society. Notwithstanding the uncontradicted evidence, that the accounts were collectible up to at least 50 per cent of their face value, the Circuit court was of the opinion it would be inequitable to permit the receiver to collect. It is apparent that as a going concern, which the Society was on the day the bank closed, these accounts and notes were abundant security for any obligations due to the bank, and apparently the auditor of public accounts was of that opinion, since he suggested the substitution of the notes of the Society for those of the customers of the bank who were slow in paying their loans.

The State also contends that the City State Co. was insolvent and never made a profit, but the uncontradicted evidence (again by a witness for the State) is to the effect that it made a profit of about \$42,000 on the sale of 500 shares of bank stock, and that two dividends had been paid to the stockholders. As a matter of fact, for months prior to the closing of the bank the bank stock was selling on the market at \$250 a share. The Cooperative Society paid \$165 a share for it, so that its net book profit in that respect would have been \$85 a share, representing a profit of \$297,500. Defendants insist that the fact that this stock was held in spite

City State Bank Report No. in order to meet same and interest

on the bank building during the period the building was being

constructed. The bank owned 51 per cent of the stock in the bank

ing company and therefore received 51 per cent of the benefit of this

The bank's financial statement for the period 1907-1908

showed to permit the receiver of the U. S. of A. to collect 50-

cents from members because of the negligence of the officers. The

evidence partly justified this conclusion. On the contrary, the

closing of the bank and the appointment of receivers for the cor-

poration utilized which had destroyed and dissipated the as-

sets of the society. Refuting the uncorroborated evidence,

that the accounts were collected up to at least 50 per cent of

their face value, the financial court was of the opinion it would be

inevitable to permit the receiver to collect. It is apparent that

as a going concern, which the society was on the day the bank closed,

these accounts and notes were abundant security for any obligations

due to the bank, and apparently the holder of public accounts was

of that opinion, since he suggested the substitution of the notes

of the society for those of the customers of the bank who were also

in paying their loans.

The bank's financial statement for the period 1907-1908

and never made a profit, but the uncorroborated evidence (again by a

witness for the state) is to the effect that it made a profit of

about \$25,000 on the sale of 500 shares of bank stock, and that

the directors had been paid in the stockholders. It is stated of

that, for months prior to the closing of the bank the bank stock was

selling on the market at \$250 a share. The Cooperative Society said

that a share for \$1, or that the stock was worth \$1 in 1907.

would have been \$25 a share, representing a profit of \$225,000.

Witnesses stated that the fact that this stock was held in equity

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of the market price at which it might have been sold is persuasive evidence of their belief that the bank was solvent. When we remember that the question of solvency in cases of this character is to be determined by the value of the assets as a going concern and by the conditions which existed on the day the bank closed, rather than by those which followed, we think it must be held the State failed to sustain the burden of proof with reference to the alleged worthlessness of the indebtedness due from the Cooperative Society.

The second principal item, as already stated, concerns the value of the building and premises of the City State Safe Deposit Co. The evidence shows that some negotiations were under way prior to the closing of the bank looking toward the sale of this building. Defendants had been informed and had reason to believe that the building was desired by the Illinois Bell Telephone Co. They had asked \$6,000,000 for the building, but had told the agent for the telephone company who was attempting to negotiate a sale, that \$5,000,000 or better would be accepted. These facts appear from the evidence of Frank D. Robinson, who also testified as a witness for the State.

Fred L. Williams, a real estate dealer with offices at 39 North Dearborn street, testified in behalf of defendants that he had sold other property in the same block to the telephone company, and that he was employed by the company to purchase this property; that in December, 1928, he approached one of the officers of the company to get a price on the property and was given a price of \$6,000,000. He says he told Mr. Robinson that if he would cut the price down to \$4,500,000 he could close the deal in 24 hours and get the money for it. This witness also testified that he talked to Mr. Abbott, president of the telephone company, and was told by him that a price of \$4,500,000 was a reasonable

at the market price at which it might have been sold in a private sale. The evidence of their belief that the price was correct, then as now, is that the question of solvency in cases of this character is to be determined by the value of the assets as a going concern and by the conditions which existed on the day the bank closed, rather than by those which followed. We think it must be held that the state failed to establish the burden of proof with reference to the alleged worthlessness of the indebtedness and those who were indebted to the company.

The same principle applies, as already stated, to the value of the building and premises of the City State Telephone Co. The evidence shows that some negotiations were under way prior to the closing of the bank looking toward the sale of this building. Robinson had been informed and had reason to believe that the building was desired by the Illinois Bell Telephone Co. They had asked \$4,000,000 for the building, but had told the agent for the Telephone company who was attempting to negotiate a sale, that \$2,000,000 or better would be accepted. These facts suggest from the evidence of Frank D. Robinson, who also testified as a witness for the state.

Frank D. Robinson, a real estate broker with offices at 39 North Dearborn street, testified in behalf of defendants that he had sold other property in the same block to the Telephone company, and that he was employed by the company to purchase this property. When in December, 1911, he approached one of the officials of the company to get a price on the property and was given a price of \$2,000,000. He says he told Mr. Robinson that if he would cut the price down to \$1,500,000 he would close the deal in 24 hours and get the money for it. This witness also testified that he called on Mr. Robinson, president of the Telephone company, and was told by him that a price of \$1,500,000 was a reasonable

price. Mr. Abbott says that he does not recall any such conversation, but it is not denied that the telephone company was buying property in that immediate vicinity.

Williams also testified to an offer from a Mr. Hoskins of Pontiac, Michigan. He says Hoskins offered \$6,000,000 for the building property, \$1,000,000 of the purchase price to be paid with property located in the center of Pontiac, and that the purchaser would assume the mortgages on the Chicago building and pay the balance of the purchase price in cash. This witness further testified that in his opinion the property in Pontiac was worth \$6,000,000. He says that the deal was pending at the time the bank closed. He also testified that he was familiar with the reasonable fair cash market value of the bank building at the date the bank closed. He said it was \$5,000,000. He testified to sales of other property in the same block on which he based his opinion.

Edwin G. Relliken corroborated the testimony of Williams and said that in July, 1929, Mr. Robinson told him (the witness) that if he could close the deal for \$5,200,000 to go ahead and close it; that in July Mr. Williams told Mr. Relliken that if he would make the price \$4,500,000 he could close the deal in 24 hours; that Mr. Williams ~~said~~^{he} at that time told him his principal was the telephone company, showed him a check of the telephone company on commissions on other sales he had made in the same block to that company. He also said that Mr. Williams had told him of the pending negotiations with Hoskins, confirming the testimony of Williams in that respect, which, indeed, is uncontradicted.

Jarema was the secretary and treasurer of the Fontenac Athletic Club, which anticipated the purchase of a building in the loop, and for that reason he said he had made inquiries as to the price at which property was being held and familiarized himself with the fair market value of the property in the loop. He stated

price. Mr. Abbott says that he does not recall any such conversation, but it is not denied that the telephone company was buying property in that immediate vicinity.

Williams also testified to an offer from a Mr. Hoskins of Pontiac, Michigan. He says Hoskins offered \$5,000,000 for the building property, \$5,000,000 of the purchase price to be paid with property located in the center of Pontiac, and that the purchaser would assume the mortgage on the Chicago building and pay the balance of the purchase price in cash. This witness further testified that in his opinion the property in Pontiac was worth \$5,000,000. He says that the deal was pending at the time the bank closed. He also testified that he was familiar with the reasonable fair cash market value of the bank building at the date the bank closed. He said it was \$5,000,000. He testified to sales of other property in the same block on which he based his opinion.

Marvin G. Holliman corroborated the testimony of Williams and said that in July, 1932, Mr. Robinson told him (in witness) that it is possible the bank for \$5,200,000 to go ahead and close it; that in July Mr. Williams told Mr. Holliman that it would make the price \$4,500,000 he could close the deal in 24 hours; that Mr. Williams said at that time told him his principal was the telephone company, wanted him a block of the telephone company on commissions on other sales he had made in the same block to that company. He also said that Mr. Williams had told him of the pending negotiations with Hoskins, containing the testimony of Williams in that respect, which, indeed, is uncontradicted.

James was the secretary and treasurer of the Pontiac Athletic Club, which anticipated the purchase of a building in the block, and for that reason he said he had made inquiries as to the value of which property was being sold and testified accordingly. He said that the market value of the property in the block, to which

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that a fair cash market value of the building was \$5,000,000 and that the actual value of the stock in the building carried on the books of the bank at \$462,000 was between \$800,000 and \$900,000. The building was ⁱencumbered by a first mortgage of \$2,500,000, underwritten by P. W. Chapman & Co., a concern with large experience in Chicago. Prior to underwriting it, the building was appraised by Babcock & Co., and upon its confidence in that appraisal P. W. Chapman & Co. underwrote the first mortgage loan for \$2,500,000. As a matter of fact, the Babcock Co. report appraised the bank building at \$4,499,606.76 (allocating to the land \$1,326,750.89) and it was set up in the books of the corporation at that appraised value. The sum of \$79,000 had been paid on the first mortgage on the building according to the testimony of Mr. Bailey, a witness for the State. There was a second mortgage on the building for \$800,000, so that it is apparent that a sale of this building for anywhere near the value placed upon it by these witnesses would have retired the stock which the bank had in the building as shown by the books and given it a very substantial profit.

As against this testimony the State introduced the somewhat qualified denial of Mr. Abbott and the testimony of one Charles J. Pose, an appraiser employed by the Chicago Title & Trust Co., who had also been employed by the Northern Trust Co. in that capacity. He testified in substance that he appraised for the Chicago Title & Trust Co. the property which was situated on the southwest corner of Randolph and Wells streets on or about November 22, 1929; that this appraisal was made ²⁰twenty days after the bank closed; that he took into consideration the value of the ground and improvements, the rentals being received by the building at the time and the actual expenses "where I could." He was then asked to state what he reported the appraisal value of the building to be November 22, 1929, and replied, after referring to his report, that he found the

that a fair cash value of the building was \$2,500,000 and that the actual value of the stock in the building owned on the books of the bank at \$11,000,000 was between \$800,000 and \$2,500,000. The building was insured by a first mortgage of \$2,500,000, underwritten by F. W. Chapman & Co., a company with large experience in Chicago. Prior to insuring it, the building was appraised by Henshaw & Co., and upon the certificate in that appraisal F. W. Chapman & Co. underwrote the first mortgage loan for \$2,500,000. As a matter of fact, the Henshaw Co. report appraised the bank building at \$1,487,000.75 (allowing for the land \$1,300,000.00) and it was set up in the books of the corporation at that appraised value. The sum of \$70,000 had been paid on the first mortgage on the building according to the testimony of Mr. Kelley, a witness for the State. There was a second mortgage on the building for \$200,000, so that it is apparent that a sale of this building for anywhere near the value placed upon it by these witnesses would have netted the stock which the bank had in the building as shown by the books and given it a very substantial profit.

As against this testimony the State introduced the testimony of Mr. Abbott and the testimony of one Charles F. Ford, an assistant manager of the Chicago Title & Trust Co., who had also been employed by the Northern Trust Co. in that capacity. He testified in substance that he was retained for the Chicago Title & Trust Co. the property which was situated on the southwest corner of Madison and LaSalle streets on or about November 11, 1900; that his assistant was made twenty days after the bank closed; that he had also contributed the value of the ground and improvements, the building being insured by the building at the time and the actual estimated value of the building at the time was \$1,400,000. He testified that the building was insured for \$2,500,000, and that the building was insured for \$2,500,000.

physical value to be \$2,632,321. He further said that he found the actual income, estimating one or two cases to be \$391,129 a year; that the expenses totalled \$260,792 a year. He stated that the building was a little more than 60 feet wide, with a depth of 180 feet on Wells street and about 80 feet or a little more on the alley; that it widened out in the rear; that there was a strip 90 by 100 feet in the front; that the corner building had 17 stories and the other 23; that he appraised the land which he found to have a value of \$70 a square foot, or a total of \$677,380, and that he appraised the corner building on the southwest corner of Randolph and Wells streets at \$632,518; that he also made an appraisal of the 23-story structure adjoining the corner building, which he appraised at \$1,172,532.

This evidence was all received over objections of defendants which, in our opinion, should have been sustained for the reason that the appraisal of Mr. Pose was made after the closing of the bank, and moreover he did not qualify as an expert on the value of this particular kind of property. City of Chicago v. Farwell, 286 Ill. 415. We have considered at length the testimony as to the two items upon which the State most strongly relies, and we think that under the rule laid down in the Clark case the People must be held to have failed in their effort to prove that upon the date the bank closed these assets were depreciated and worthless.

We shall not endeavor to review at length the testimony with reference to other items. One of these was an alleged indebtedness of the City State Co. to the bank for \$19,523.63. The City State Co., however, at the time the bank closed had on deposit in it \$5,447.40, also a trust account of \$1,160.55, making a total sum of \$6,607.95, which reduced its indebtedness to less than \$12,000. For the amount the bank held collateral to the loan \$20,000 of first mortgage bonds on the bank building, so it would appear that this

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loan was well secured.

The Peoples Life Insurance Co. is another one of the assets of the Society which the State contends was worthless. It had at the time the bank failed policies outstanding to the amount of \$17,500,000. It had at one time purchased 3,396 shares of the bank stock, but the insurance department objected to its holding that stock because of the possible statutory liability and suggested that the trustees of the Society should give their note to the ^{bank} insurance company, putting the ~~bank~~ stock up as collateral, the stock being issued to the trustees. The matter was carried out in that way. It is thus apparent that the stability of the insurance company depended upon the stability of the bank, and the closing of the bank wiped out that asset.

Mr. Robinson, witness for the State, testified that shortly before the closing of the bank it had a very substantial offer for the Peoples Life Insurance Co. John V. Lees testified he had been engaged in the life insurance business for 25 years, had occasion during that time to appraise the value of many such companies and for many years represented clients in the purchase thereof. In fact it was his business to set a valuation on the stock of these companies and he had participated in negotiations for the sale and purchase of 31 companies. In August, 1929, he had appraised the Peoples Life Insurance Co. and had clients who wanted to buy it and negotiations were on continuously from August until the closing of the bank. His testimony was that 20,000 shares of stock of the company were worth from \$45 to \$50 a share, making a total of between \$900,000 to \$1,000,000. This evidence, however, was stricken by the court.

The State says that Mr. Robinson testified that the C. S. of A. was not able to pay its indebtedness to the bank, but apparently that statement was made as a conclusion, because on cross-

from was well received.

The Peoples Life Insurance Co. is another one of the assets at the Society which the State contends was worthless. It had at the time the bank failed policies outstanding to the amount of \$17,200,000. It had at one time purchased 2,300 shares of the bank stock, but the insurance department objected to its holding that stock because of the possible statutory liability and suggested that the trustees of the Society should give their note to the insurance company, putting the bank stock up as collateral, the stock being issued to the trustees. The matter was carried out in that way. It is thus apparent that the stability of the insurance company depended upon the stability of the bank, and the closing of the bank meant the end of the insurance company.

Mr. Robinson, witness for the State, testified that shortly before the closing of the bank it had a very substantial offer for the Peoples Life Insurance Co. John V. Dees testified he had been engaged in the life insurance business for 25 years, had occasion during that time to appraise the value of many such companies and for many years represented clients in the purchase thereof. In 1902 it was his business to set a valuation on the stock of these companies and he had participated in negotiations for the sale and purchase of 25 companies. In August, 1902, he had represented the Peoples Life Insurance Co. and had clients who wanted to buy it and negotiations were on continuously from August until the closing of the bank. His testimony was that 20,000 shares of stock of the company were sold from the bank to the State, making a total of \$2,000,000. This evidence, however, was refuted by the court.

The State says that Mr. Robinson testified that the U. S. A. was not able to pay its indebtedness to the bank, but says only that statement was made as a conclusion, because on cross-

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examination he testified that Mr. Stedman said to the State Auditor that the C. S. of A. had 40,000 members and that it was responsible for its indebtedness and able to liquidate it if given proper time. The witness said that he also believed this to be true.

It would unduly extend this opinion to go farther into these matters. It is apparent that within the rule laid down in the Clark case it was not shown that the bank was insolvent at the time the deposit was received, and there are other circumstances in evidence tending to show that if it was in fact insolvent these defendants did not know it and in good faith believed that it was solvent. Some of these are that Mr. Stedman made a substantial deposit in the bank the day before it closed and that on the day it closed he held in his commercial account \$631.47; that in addition he held a savings account of \$580, from which nothing had ever been withdrawn, and that Mrs. Stedman at the time the bank closed had a savings account there of \$580, from which nothing had ever been withdrawn. In addition to that, Stedman had invested largely in various real estate bonds and mortgages which we sold to him through the bank. It must be remembered that the primary responsibility for the operations of the bank rested upon Mr. Miller, now deceased, who before and at the time the bank closed was president and who had been placed in that office because of his large experience in banking. He was strongly recommended by the auditor of public accounts, as was Guy L. Bush who was later made an executive vice-president because of his supposed experience and judgment. Bush had served as a bank examiner for 17 years and was employed by the auditor of public accounts at the time his name was suggested for a place with the bank. The real estate department, from which most of the troubles of the bank arose, was in fact opened up by Mr. Bush when he made his connection with the bank. Mr. Stedman had particular charge of the trust department, and every trust (with the

examination be facilitated that Mr. Stebbins said to the State Auditor
that the C. M. & A. had no money and that it was responsible
for its indebtedness and also to the State Auditor is it given proper care.
The witnesses said that he also believed this to be true.
It would hardly extend this opinion to the further fact that
however. It is apparent that within the time laid down in the
Gibbs case it was not shown that the bank was insolvent at the time
the deposit was received, and there are other circumstances in evi-
dence tending to show that it is in fact insolvent from the
testimony did not know it and in good faith believed that it was
solvent. It is also stated that the bank was a responsible
deposit in the bank the day before it closed and that on the day it
closed he held in his commercial account \$331.47; that in addition
he held a savings account of \$500, from which nothing had ever been
withdrawn, and that Mrs. Stebbins at the time the bank closed had a
savings account there of \$250, from which nothing had ever been
withdrawn. In addition to that, Stebbins had invested largely in
various real estate bonds and mortgages which he sold to him through
the bank. It must be remembered that the primary responsibility
for the operations of the bank rested upon Mr. Miller, now de-
ceased, who before and at the time the bank closed was president
and who had been placed in that office because of his large experi-
ence in banking. He was strongly recommended by the auditor of
public accounts, as was Guy L. Mann who was later made an executive
vice-president because of his supposed experience and judgment.
Mann had served as a bank examiner for 17 years and was employed by
the auditor of public accounts at the time his name was suggested
for a place with the bank. The real estate department, from which
most of the troubles of the bank arose, was in fact opened up by Mr.
Mann when he made his connection with the bank. Mr. Stebbins has
particular knowledge of the bank's management, and very truly the

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exception of two in which there is a contest between the beneficiaries) has been liquidated in full.

Mr. Jarema was the treasurer of the Pontenac Athletic Club. He had more than \$70,000 on deposit in the bank as such treasurer when it closed, and his two minor children had savings accounts there at that time.

As a matter of fact, at the time of the trial the bank in liquidation had paid dividends to its depositors amounting to 32 per cent and had more than a million dollars of assets yet to be liquidated. All preferred claims and all deposits made by conservators, administrators and guardians have been paid in full. Resources of the book value of \$2,121,618.22 remain to be liquidated. Looking backward it is, of course, easy to say that mistakes were made, but in order to justly appraise the situation one must consider the situation as it was at the time these things occurred. The unparalleled depreciation in the valuation of all assets which has taken place since 1929 does not need description. It is recognized judicially by all the courts. There are few, if any, of our people who do not have definite information in that respect. The old proverb may well be applied to this situation, "Hindsight is better than foresight."

There is another circumstance to which attention should be called. The directors of the bank met with the examiner on the day before the bank closed. It was anticipated that money could be obtained through another Chicago bank. The evidence is that the auditor was asked whether this bank should open the following day and replied that it should, but advised that the deposits should be segregated. The evidence also shows that defendants supposed an order to that effect had been given. If it was complied with the prosecuting witness might have easily secured the return of her money as a preferred claim upon proof of insolvency. Whether a

exception of two in which there is a contact between the horizontal
 (lines) has been identified in 1911.
 Mr. Jansen was the treasurer of the Southern Railway Co.
 He had more than \$20,000 on deposit in the bank on such treasurer
 when it closed, and had two minor children and savings accounts
 there at that time.
 As a matter of fact, at the time of the trial the bank in
 liquidation had paid dividends to its depositors amounting to \$2
 per cent and had more than a million dollars of assets yet to be
 liquidated. All preferred claims and all deposits made by contribu-
 tions, shareholders and creditors were paid in full. The
 balance of the bank value of \$3,181,818.88 remains to be liquidated.
 Nothing remained to be, of course, except to say that witnesses were
 made, but in order to fairly represent the situation and not over-
 state the situation as it was at the time these things occurred.
 The liquidated situation is the situation of all assets which
 has been placed since 1930 does not need description. It is
 recognized judicially by all the courts. There was not, in any of
 our people who do not have definite information in that respect.
 The old proverb may well be applied to this situation, "Birds of a
 feather flock together."
 There is another circumstance to which attention should be
 called. The directors of the bank met with the treasurer on the
 day after the bank closed. It was suggested that money could be
 obtained through various Chicago banks. The witness is that the
 matter was asked whether this bank should open the following day
 and replied that it would, but advised that the bank should
 be reorganized. The evidence also shows that telegrams were sent on
 after to that effect and been given. It is not suggested that the
 proceeding witness might have easily secured the reorganization
 money as a practical matter after the liquidation.

deposit made under such circumstances is a deposit within the meaning of this criminal statute, it is unnecessary to decide.

For the reasons already suggested the judgment as to all the defendants will be reversed and the cause remanded, with directions to the court to quash the indictment as to defendants Castle and Hartray.

See
REVERSED AND REMANDED WITH DIRECTIONS.

H
O'Connor, D. J., and McSurely, J., concur.

General made under such circumstances is a correct witness
meaning of this criminal statute, it is unnecessary to decide.
For the reasons already assigned the judgment is affirmed.
The following bill of exceptions was filed and allowed, viz:
Directions to the court to grant the indictment as so amended.
Said and verified.

REVEREND THE HONORABLE THE JUDGE

October, 1881, and February, 1882, court.

38022

ORLEAN LISTON BROWN JOHNSON, et al,

(Contestants) Appellants,

v.

FIRST UNION TRUST & SAVINGS BANK, as
Executor and Trustee under the Last
Will and Testament of William L.
Brown, Deceased, et al,

(Proponents) Appellees.

CIRCUIT COURT

COCK COUNTY.

279 I.A. 631¹

Opinion filed alone Wednesday March 20, 1935

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This cause is here on appeal from a decree of the Circuit Court dismissing the bill of complaint for want of equity. The cause was before this court on a former appeal, number 38337 and reported in full in Johnson v. First Union Trust and Savings Bank, et al 273 Ill. App. 472. The proceeding is one by certain heirs of William L. Brown, seeking to set aside his last will and testament.

On the prior hearing in the Circuit Court evidence was heard, the issues submitted to a jury which returned a verdict in favor of the contestants, and a decree was entered in their favor upon the verdict. Upon a review in this court the judgment was reversed and the cause remanded for a new trial. This court held that under the evidence the chancellor should have directed a verdict in favor of the proponents of the will and against the contestants.

The evidence was voluminous. A great number of witnesses were called and examined, many depositions were taken, numerous exhibits introduced in evidence, and upon the retrial of the cause a stipulation was entered into by the parties in which it was agreed that the same evidence should be considered as presented and heard, and such evidence as was rejected was to be considered as offered and the same rulings made as upon the former trial. A jury was empanelled and the chancellor directed the jury to answer certain interrogatories, which amounted to a directed verdict in favor of the

1935

WILLIAM LLOYD GIBBS, JR.,

(Respondent)

vs.

WILLIAM LLOYD GIBBS, JR.,
Respondent, and
WILLIAM LLOYD GIBBS, JR.,
Respondent, et al.

(Respondent)

Opinion filed along Wednesday March 20, 1935

THE COURT, after having read the bill of the

This cause is now on appeal from a decree of the

court granting the bill of complaint for writ of habeas

corpus and before this court on a former appeal, which court

reported in this case as William L. Gibbs, Jr. and

THE LIT. CO., INC. The proceeding is one by writ of habeas

corpus, seeking to set aside the last will and testament.

In the briefs filed in the circuit court, the

last, the issue submitted for a jury which returned a verdict in

favor of the respondent, and a decree was entered in that favor

the verdict. Then a review in this court the judgment was reversed.

and the court remanded for a new trial. This court held that under

the evidence the chancellor should have directed a verdict in favor

of the respondents of the will and against the respondent.

The witness was incompetent. A party cannot be a witness

even called and examined, only disqualified with leave, however

existing disqualification is removed, and upon the refusal of the court

to grant the writ of habeas corpus the court is held to be

that the same witness should be qualified as competent and heard,

and that witness as not qualified was to be qualified as offered

and the court called him to stand for the first time. A jury was

empaneled and the testimony directed the jury to return a verdict

in favor of the respondent, which was set aside by the court.

proponents of the will, and a decree was entered dismissing the bill for want of equity. It is from this decree that the cause is now here on the second appeal.

In its former opinion this court considered the evidence in extenso and it would answer no good purpose to again review the facts nor to review the law ascertaining thereto. It is contended, however, by contestants that the cause now being here as the result of a directed verdict, that every intendment in favor of the evidence produced by the contestants should be indulged in and that if there is any evidence which, standing alone, would warrant the submission of the issues to a jury, then the cause should be reversed. We do not, however, believe such to be rule in this jurisdiction in cases of this character. The test as we understand it is whether there is evidence in the record which, taken with all its reasonable inferences in the aspect most favorable to the contestants, may be said to be sufficient in law to support the action. The Supreme Court in the case of Greenless v. Allen, 341 Ill. 333, speaking of the rule, says:

"The issue involved here is whether the court erred in instructing the jury to return a verdict upholding the will. The test of the existence of error in this regard is whether there is evidence in the record which, with all its reasonable inferences, taken in the aspect most favorable to the contestant, may be said to be sufficient in law to support the cause of action. (Burns v. City of Chicago, 338 Ill. 89; Bailey v. Oberlander, 338 id. 308.) The rule applied in some jurisdictions, that if there is any evidence - even a scintilla - tending to support plaintiff's case the cause must be submitted to the jury is not followed in this State, and we consider the more reasonable rule, and the one which has come to be established by weight of authority, to be as above stated. Under this rule, if the chancellor who heard the testimony was convinced that a verdict for the contestants must necessarily be set aside because the evidence, with all its reasonable inferences and intendments, does not so support the verdict, it then became the duty of the court to withdraw the issues from the jury and enter a finding. Woodman v. Illinois Trust and Savings Bank, 311 Ill. 570; Bartelott v. International Bank, 118 id. 350; Simmons v. Chicago and North Western Ry. Co., 110 id. 340."

...of the will, and a device was entered showing the will
for want of equity. It is from this device that the name is now
kept as the second appeal.

In the former opinion this court considered the evidence
in regard to it and it would appear as good reason to believe that
there was no reason for the law concerning the same. It is concluded
however, by considering that the same was being done as the result
of a common understanding between the parties of the evidence
presented by the respondents should be included in and that it there
is any reason for it, it would appear that the respondents
of the issue is a jury, with the court should be satisfied. It is
not, however, believed that to be held in this jurisdiction is more
of this character. The fact as to whether it is whether there
is evidence in the record which, with all the circumstances
intention in the record must be shown in the respondents, may be
said to be sufficient in law to support the action. The court
says in the case of Johnson v. Johnson, 201 Ill. 407, reported at

the 10th page.

"THE COURT further says in regard to the same that
in reaching the fact of intent a finding should be
made. The fact of the intention of intent in this regard
is stated that is evidence in the record which, with
all the circumstances, should be included in and that it there
is any reason for it, it would appear that the respondents
of the issue is a jury, with the court should be satisfied. It is
not, however, believed that to be held in this jurisdiction is more
of this character. The fact as to whether it is whether there
is evidence in the record which, with all the circumstances
intention in the record must be shown in the respondents, may be
said to be sufficient in law to support the action. The court
says in the case of Johnson v. Johnson, 201 Ill. 407, reported at
the 10th page.

It is also urged as a ground for reversal that in the previous opinion of this court sufficient weight was not given to the testimony of the experts called on behalf of the contestants. It is pointed out that in the opinion this court stated that such testimony is unsatisfactory and is generally discredited. The language used in reference to expert witnesses in that opinion very closely follows the language of the Supreme Court in speaking of expert witnesses as found in the opinion in WBB v. Fryer, 294 Ill. 538. The testimony of the experts was not disregarded by this court in its consideration of the case, but only such weight given to it as under the holdings of the Supreme Court of this state it was entitled to. In this connection we are referred to a recent case entitled, People v. Jung, 338 Ill. 488. That case, however, was a criminal action based upon a forged instrument and the court there held in effect that in cases of forgery there is little direct evidence obtainable and the question necessarily becomes one requiring expert evidence. It is also apparent in reading the opinion in the case of People v. Jung, supra, that the court was of the opinion that the jury entirely ignored the expert testimony and considered it of no weight whatever. We do not believe that that case varied the rule as to the consideration that should be given such testimony.

We see no reason for departing from the view of this court as announced in its former decision and, for that reason and for the reasons expressed in this opinion, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HESEL, F.J. AND HALL, J. CONCUR.

37978

ELIZABETH H. MANNING,
Respondent,

vs.

F. W. WOOLWORTH CO., a Corporation,
and IRENE LEONARD PRUEITT,
Petitioners.

PETITION FOR LEAVE TO
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 631²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case against the Woolworth Co., joining as defendant one of its employees, a saleslady. The declaration, which is in one count, avers in substance that the Woolworth Co. on and prior to April 11, 1932, conducted a department store on Michigan Boulevard, Chicago; defendant, Irene Prueitt, was in charge of the counter where combs were sold; that plaintiff purchased a dozen of these combs through her; that the combs were sold without advice or information as to their quality or condition; that plaintiff took the combs home, washed her hair and partially dried it, placed the combs in her hair for the purpose of producing a wave; that she then exposed her hair to the rays of a lamp which was held about eighteen inches from her hair for the purpose of drying her hair; that she did not know of the danger; that the combs were made of inflammable material, which ignited without coming in contact with the flame or lamp, and exploded; that she was thereby burned and injured.

Defendants filed a plea of the general issue. There was a trial by jury, resulting in a verdict for defendants. The court, however, upon motion of plaintiff granted a new trial, and defendants petitioned this court for an appeal from that order, which was allowed, as provided in section 77 of the Civil Practice Act (Cahill's Ill. Rev. Stats., chap. 110, sec. 77, par. 205.)

The question for decision is whether the court erred in granting the motion for a new trial.

WILLIAM L. BROWN,
Attorney at Law,
Washington, D. C.

VS.

J. W. WOODWARD CO., a Corporation,
and JOHN EDWARD BROWN,
Petitioners.

279 I. A. 631

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Plaintiff brought an action on the case against the Defendant Co., joining as defendant one of its employees, a witness. The Defendant, which is in one count, avers in substance that the Defendant Co. on and prior to April 11, 1918, conducted a business of selling and distributing certain goods, including, among others, certain goods which were sold; that Plaintiff purchased a dozen of these goods through her; that the goods were sold without advice or information as to their quality or condition; that Plaintiff took the goods home, washed her hair and put on a wig; placed the goods in her hair for the purpose of styling her hair; that she then exposed her hair to the rays of a lamp which was held about fifteen inches from her hair for the purpose of drying her hair; that she did not know of the danger; that the goods were made of inflammable material, which ignited without contact with the flame of a lamp, and exploded; that she was thereby injured and injured.

Defendant filed a plea of the general issue. There was a trial by jury, resulting in a verdict for defendant. The court, however, upon motion of plaintiff granted a new trial, and defendant petitioned this court for an order that said trial be set aside and a new trial be granted in section 71 of the Civil Practice and Procedure Act (D.C. Code, 1917, sec. 110, par. 1007).

The question for decision is whether the court erred in granting the motion for a new trial.

Upon the trial plaintiff testified that prior to her accident she bought twelve celluloid combs from the Woolworth store; that nothing was said to her about their properties or characteristics; that she was not told they were dangerous or that they would burn or explode. On the evening of April 11, 1932, she was in a hurry to have a wave because she was going out. She had made these waves before, and to that end she borrowed from a neighbor an infra red lamp because if heat was not applied it would take hours for her hair to dry. She washed her hair and put the combs in it. The lamp, a circular hood shaped affair, was, she says, the kind used in beauty parlors; the combs became heated and very warm inside; she sat in a low chair beneath the lamp for about three-quarters of an hour; it threw out a comfortable heat and as time went on it got warmer; as she sat there she could put her hand between her head and the lamp; she sat underneath the lamp with the shield or reflector directly over her head; she put in one comb a little forward, another a little back, producing an irregular line; the combs were placed quite far apart to give a wide wave. While waiting for her hair to dry she suddenly looked up and saw her hair on fire; she screamed for help and put a rug on top of her head; she was badly burned and spent about \$300 for the services of a doctor and nurse. There is a permanent injury to her scalp.

She says she had heated her hair in the same way before and did not know that celluloid, out of which the combs were made, would burn. She had been treated in beauty parlors where the lamps were placed several inches away from her head. Plaintiff was her only occurrence witness.

She, however, offered expert evidence to the effect that celluloid is a compound made from celluloid by first converting it into cellulose nitrate; that sometimes it is called nitrocellulose or pyroxylin. In making celluloid it is plastic and can be shaped

[illegible]

under heat; it is mixed with a material known as a plasticizer to make it plastic, and the plastic most commonly used is ordinary camphor. Coloring matter is put in to give celluloid different colors. The expert was shown a piece of comb and asked whether he could tell of what material it was made; he replied it was a form of celluloid but whether nitrate or acetate he could not tell without heating it up; he was handed a match which he applied, and said, "That looks like nitrate to me; yes, it is." He further said that when cellulose was treated with nitric acid it formed cellulose nitrate, a combination of carbon, hydrogen, nitrogen and oxygen; it contains enough oxygen so that when lighted it would keep going off, even though no air was applied to it; it looks very much like smokeless powder; the nitrogen content in percentage runs anywhere from around 11 to 13 per cent, which was a fairly high content; it does not need assistance from outside air in order to burn, as it contains enough oxygen in the compound itself. Commercially the product was called celluloid and had been known as such so long that it is its common name. Different companies had called it by various trade names.

When asked concerning the degree of heat required to ignite celluloid, the expert answered that this would depend somewhat upon the variety. If the manufacturer was careful in making it, the ignition point might be around 160 degrees C., or 310 degrees F. If poorly made, it might be as low as 250 degrees F., or, in other words, 40 or 50 degrees above the boiling point of water. It is not necessary (he further says) to touch a flame to it. If heated by any means at all up to the right temperature, it would ignite and get on fire. When the celluloid was heated near the point where it would take fire it would start to decompose and smoke, sometimes a vapor would come out. When decomposition starts in heat is developed in the material itself and thereafter it gets hotter and

under heat; it is mixed with a material known as a plasticizer, which is plastic, and the plasticizer is used in the coloring matter is put in as five colored dyes. The expert was shown a piece of candy and asked whether he could tell of what material it was made; he replied it was a form of cellulose but whether it was of vegetable he could not tell without testing it up; he was handed a watch which he replied, was made "That looks like nitrate to me; yes, it is." He then said that when cellulose was treated with nitric acid it formed cellulose nitrate, a combination of nitrate, nitrous acid, and water; it contains enough oxygen to form nitric acid if it were heated, even though no air was supplied to it; it looks very much like smokeless powder; the nitrogen content in percentage runs anywhere from around 10 to 15 per cent, which was a fairly high content; it does not need an oxidizer from outside air in order to burn, as it contains enough oxygen in the compound itself. Commercially the product was called celluloid and had been known as such for long time it is the same thing. Nitrate cellulose is called it by various other names.

Then asked regarding the degree of heat required to ignite celluloid, the expert answered that that would depend somewhat upon the quality. If the manufacturer was careful in making it, the ignition point might be around 250 degrees C., or 500 degrees F. If poorly made, it might be as low as 200 degrees F., or, in other words, 40 or 50 degrees above the boiling point of water. It is not necessary (he further says) to form a flame as it. It heated by any means at all up to the right temperature, it would ignite and set on fire. When the celluloid was heated near the point where it would take fire it would first be decomposed and water, sometimes a great deal of water, would be evolved. When decomposition starts in heat it is evolved in the material itself and therefore it can never be

hotter and the action becomes faster and faster until all of a sudden it goes up in a flash. Any kind of heat, whether from stove or electric light bulb, will cause it to act in this way. The action depends somewhat on the color; if white the celluloid reflects some of the heat and it takes longer than if dark; if it is dark colored it absorbs the heat and gets warmer until it is hot and then goes off just like gun powder.

The witness said that the material handed to him (a part of one of the combs) was very inflammable. The test he made would not be sufficient to determine the degree of stability. The material, he said, would ignite without actual contact with flame. A lamp similar to one used by plaintiff was produced. During the trial the electricity was turned on and the witness testified that the disk at the top of the hood was red hot, somewhere between 800 and 900 degrees F.; that infra red light was another name for a heat ray; that where the lights were placed under a reflector the heat rays would be given off from the hot piece of metal and go in all directions; that rays that struck alongside the reflector were reflected back and thrown out together with the others and thus increased the amount of heat on a given square inch of surface.

In response to a hypothetical question as to whether a light of this kind placed over the combs would cause the combs to be inflamed, the expert said he was of the opinion that the celluloid would explode, and explained in detail to the jury his reasons for this opinion. The witness put part of a comb in contact with the red hot plate of the lamp, and the comb teeth burst into flame. He then experimented by putting the comb close to the red hot plate without touching it, bringing it nearer gradually and holding it longer. It began to bubble and finally flashed. The expert said the flash was caused by the development of vapors. He said he thought the experiment took about three minutes, but Mr. Bloom-

hotter and the action becomes faster and faster until all of a sudden it comes to a standstill. Any kind of heat, whether from above or electric light bulb, will cause it to act in this way. The action depends somewhat on the color; if white the coil will reflect some of the heat and it takes longer than if dark; if it is dark colored it absorbs the heat and gets warmer until it is hot and then goes off just like gun powder.

The witness said that the material burned in this (a part of one of the coils) was very inflammable. The fact he made would not be sufficient to determine the degree of stability. The material, he said, would ignite without actual contact with flame. A lamp similar to one used by plaintiff was produced, during the trial the electrically was turned on and the witness testified that the heat at the top of the hood was red hot, somewhere between 600 and 700 degrees F.; that while the light was on the hood was red hot; that where the lights were placed under a reflector the heat rays would be given off from the hot plate of metal and go in all directions; that rays that struck alongside the reflector were reflected back and thrown out together with the others and thus increased the amount of heat on a given square inch of surface. In testimony to a hypothetical question as to whether a light of this kind placed over the candle would cause the candle to be extinguished, the expert said he was of the opinion that the candle would not explode, and explained in detail to the jury his reasons for this opinion. The witness put part of a candle in contact with the red hot plate of the lamp, and the candle melted but did not burn. He then experimented by putting the candle close to the red hot plate without touching it, stating it would probably not burn. It began to bubble and finally flamed. The expert said the flame was caused by the development of vapor. He said he thought the treatment was about the same as that of the

ington, attorney for plaintiff, said that according to actual count it took 70 seconds. The expert then described in detail what the effect of a head of hair might have on the experiment, etc.

There was a sharp conflict in the evidence as to whether the combs plaintiff ^{said she} used at the time she was injured were actually purchased at defendant's store. Miss Prueitt, a saleswoman and named as co-defendant, was called as plaintiff's witness, and plaintiff being recalled as a witness identified her as the one from whom she bought the combs. On cross examination plaintiff said she had bought combs on only one occasion; that she did not know the date she bought them but that it was within a year before April, 1931. She did not recall whether she said anything to the saleswoman or the saleswoman said anything to her. She said: "The combs were probably on the counter, I don't know. I don't remember their being on cards. I don't recall. I have no memory of any cards at all."

John Michala, an investigator for plaintiff's attorney, testified that in the early part of 1932 he went to the Woolworth store for the purpose of inquiry and talked with Miss Prueitt; that he showed a part of a comb to her and she told him that the sale of them had been discontinued; that there were some complaints against them and a law against selling them; that she said she remembered the comb and that she sold it; that she also said the combs were inflammable. He fixes the date he was there as November 10, 1932, and says that Miss Prueitt was at the counter at the northeast corner, where there were combs and celluloid articles. On cross examination he said the combs were on cards; that he didn't know what they were made of; that he didn't read what was said on the cards, which contained some printed matter; that Miss Prueitt took the comb and told him she had sold that identical comb, but that he couldn't get a comb like that any more. He says, "She told me she had probably

ingston, attorney for plaintiff, said that according to actual count it took 70 seconds. The expert then testified in detail that the effect of a head of hair might have on the experiment, etc. There was a sharp conflict in the evidence as to whether the count plaintiff used at the time she was injured was actually purchased at defendant's store. Miss Threlkett, a saleswoman and named as co-defendant, was called as plaintiff's witness, and plaintiff's lawyer recalled as a witness identified her as the one from whom she bought the comb. On cross examination plaintiff said she had bought combs on only one occasion; that she did not know the saleswoman from whom she bought them but that it was within a year before April, 1933. She did not recall whether she said anything to the saleswoman or the saleswoman said anything to her. She said: "The combs were probably on the counter, I don't know. I saw a number of their being on cards. I don't recall. I have no memory of any comb at all."

John Michael, an investigator for plaintiff's attorney, testified that in the early part of 1933 he went to the Woolworth store for the purpose of inquiry and talked with Miss Threlkett; that he showed a part of a comb to her and she told him that the sale of them had been discontinued; that there were some complaints against them and a law against selling them; that she said she remembered the comb and that she sold it; that she also said the combs were for sale. He then the date he was there as November 10, 1933, and says that Miss Threlkett was at the counter at the defendant's counter where there were combs and testified against. On cross examination he said the combs were on cards; that he didn't know what they were called; that he didn't read what was said on the cards, which contained some outdated matter; that Miss Threlkett took the comb and told him she had sold that identical comb, but that he wouldn't get a comb like that any more. He says, "She said she had probably

sold that comb, not the broken part. ** I don't know whether she meant to intimate that she sold that particular comb, or not."

Mr. Powers testified for defendant that he was the manager of defendant's store in 1931 and was familiar with the celluloid combs sold there during that year; that these combs were on cards and none of them was sold loose, and that the two pieces of comb marked as "plaintiff's exhibit 1" (which apparently are not in the record) were not like the kind sold at Woolworth's store at that time; that he was able to determine this because each one of the combs sold was stamped on the back and marked "Inflammable - do not use with dryer or artificial heat." The combs that were sold on cards (he said) had the same warning phrase, and that the card marked "defendant's exhibit 1" (which is also not in the record) was sold and used during 1931.

Miss Prueitt testified she remembered Mr. Michala; that she did not tell him she had sold the comb, a piece of which was handed to her; that she was in charge of the sale of celluloid combs at the Woolworth store for several years, and in 1931; that they did not sell any combs like plaintiff's exhibit 1 in her department in the Woolworth store in 1931; that they were all marked "Inflammable - don't use dryer," and that they did not have any combs for sale during 1931 that were not marked that way. She identified defendant's exhibit 2 as another type of comb with card that was sold that year, which had on it the words "Inflammable - do not get near artificial heat." She also described in detail the differences between the comb produced by plaintiff and the kind of comb sold at defendant's store and identified two types of combs sold by defendant, both of which she said contained words of warning as to their inflammability.

Defendant also produced an expert witness, who testified to the same general facts with reference to the characteristics of

celluloid, to which plaintiff's expert witness testified. He said it would take fire without coming in contact with an actual flame, if raised to a temperature of 400, sometimes 350, degrees. He testified that he took the lamp that was in the courtroom to his office and made experiments with it, using celluloid with hair and potatoes. Over objection he was allowed to state that he made experiments at his office to determine the time, distance and conditions under which the celluloid would take fire when near the lamp; that he measured the heat by a thermometer; that the element was heated until about 500 degrees F. He arranged a rule with inch marks on it so he could slide the thermometer along in different positions, measuring the temperature at each interval from the heating unit with a thermometer; that if the rule were put at right angles with that heating unit the temperature indications were very misleading; that if a person put his hand or head in there so that the heat would fall on it, then the heat accumulated on it and the temperature at that point would be of importance; that a series of experiments were made at distances of two inches, three inches and regular steps up to eight inches. When he tried to put his fingers at a distance of four inches from the lamp, he said, which was equivalent to the distance to the edge of the reflector surface, he couldn't do so because it was too hot. He said he took a good-sized piece of the celluloid, wrapped some human hair around it and placed it on a piece of potato; that he used a potato because the heat absorbing value of a potato is almost equivalent to the human face; that ^{at} the end of twenty minutes the celluloid began to blister and swell and show little white spots; that at a distance of about three inches from the edge of the lamp the celluloid blistered but did not take fire; that he left it there about 38 minutes. The celluloid did not ignite; the potato was cooked and baked; the hair was still there but looked as if it had been heated hot; he said that the gas or

calculated to within 1/100th of a degree Fahrenheit. It was
it would take time without coming in contact with an actual flame,
it raised to a temperature of 400, sometimes 500, degrees. He had
filled that he took the lamp that was in the courtroom to his office
and made experiments with it, using caliche with hair and paper.
Over objection he was allowed to state that he made experiments in
his office to determine the time, distance and conditions under
which the caliche would take time when near the lamp; that he
examined the heat by a thermometer; that the element was heated
with about 500 degrees F. He arranged a table with lamp burner so it
could be held close to the thermometer along in different positions,
measuring the temperature at each interval from the heating unit
with a thermometer; that if the table were out of sight under the
lamp heating unit the temperature indications were very misleading;
that if a person put his hand or head in there he would feel the heat
would tell on it. When the heat accumulated on it and the temperature
at that point would be of importance; that a series of experiments
were made at distances of two inches, three inches and regular steps
up to eight inches. When he tried to put his fingers at a distance
of four inches from the lamp, he said, which was equivalent to the
distance to the edge of the reflector surface, he couldn't do so be-
cause it was too hot. He said he took a good-sized piece of the
caliche, wrapped some human hair around it and placed it on a
piece of potato; that he used a potato because the heat absorbing
value of a potato is almost equivalent to the human face; that the
end of twenty minutes the caliche began to blister and swell and
show little white spots; that at a distance of about three inches
from the edge of the lamp the caliche blistered but did not take
fire; that he left it there about 30 minutes. The caliche did
not blister; the potato was cooked and baked; the hair was still there
but looked as if it had been heated; he said that the face of

vapor that comes from blistering celluloid is not combustible; that he made tests to determine that; that he took the celluloid, gradually heated it, raising the temperature and watching it; that the celluloid began to flatten down and become plastic. He was asked to take a piece of the comb which the attorney for plaintiff had in his pocket and to demonstrate with it. There was an objection. The witness stated that the purpose was to demonstrate whether combustible gases or vapors arose from the disintegrating celluloid that had been heated. The attorney for plaintiff strenuously objected to permitting the witness to state his opinion. The witness said he had placed the teeth of a comb at intervals of one inch for a distance of 20 inches from the element in a regular line and then turning on the lamp noticed that the teeth of the comb would drop down and those that were close enough melt and fall off; that the tests ran for an hour and none of the teeth caught fire; that if a person had celluloid combs in her hair and would put the head within three or four inches from the bottom of that reflector with the heat on at full force, the flesh on the head would burn before the hair; that if a person with celluloid combs in her hair should put her head up against the red hot element the celluloid combs would readily blister.

The motion for a new trial seems to have been allowed upon the theory that some of the expert evidence offered in behalf of defendant was not admissible for the reason that it was in the nature of an experiment, which was not substantially similar to the actual situation at the time the accident occurred. We are inclined to the opinion that it was objectionable upon that ground. Plaintiff has pointed out some ten respects in which the experiment submitted by defendant was unlike the actual situation at the time the accident happened. The general rule is, of course, that there must be substantial, although not exact, uniformity. The admission of such evidence was held erroneous under circumstances there appearing

in Orchards v. N. Y. C. & St. L. R. Co., 250 Ill. App. 22, and the Appellate court held that the trial court did not err in refusing to admit such experiment in Upthegrove v. C. & N. W. Ry. Co., 154 Ill. App. 460. The true rule is stated in 4 Chamberlayne on Evidence, sec. 3174, p. 4375, quoted with approval in Arakelian v. Southern Pacific Co., 220 Ill. App. 160, where the judgment was reversed because of the admission of such evidence.

The situation here, however, seems to be quite different from what it was in those cases. While the experiment offered by defendant was far from accurate from a scientific standpoint, similar evidence, which was quite as much, or more, objectionable was admitted in behalf of plaintiff. It would seem that having undertaken to introduce evidence of this character in her own behalf, plaintiff is not in a position to object that similar evidence was introduced in behalf of defendant. This rule is laid down in a number of Illinois cases. Ill. Cent. R. R. Co. v. Burns, 32 Ill. App. 196; Orchards v. N. Y. C. & St. L. R. Co., 263 Ill. App. 397. In the last named case the Appellate court said:

"Appellant having persuaded the court to admit testimony in regard to the combustibility of cork with much greater latitude on the part of appellant is not in a position now to object to similar testimony on the part of appellee in rebuttal."

In other words, plaintiff is not in a position to object to the experiment submitted in behalf of defendant when she offered similar evidence just as objectionable from a scientific standpoint. We think that, considered as experiments showing supposed conditions at the time of the accident, the evidence of plaintiff was as worthless as that of defendant. We hold the jury could reasonably find from the evidence in this case that the combs plaintiff purchased (if from defendant company) were sold with a warning of their inflammable character, and that her injuries were the result of her own negligence. No complaint is made concerning the instructions,

Southern Bell Co., 97 Ill. App. 100, where the judgment was reversed because of the admission of such evidence.

The witness here, however, seems to be quite different from what it was in those cases. While the experiment offered by defendant was far from accurate from a scientific standpoint, minor evidence, which was given as much, or more, objectively admitted in detail of alibi. It would seem that having been taken to introduce evidence of this character in her own behalf, defendant is not in a position to object that similar evidence was introduced in detail of defendant. This rule is laid down in a number of Illinois cases. Ill. Cases, 60 N. W. 2d 117.

App. 198; People v. E. J. A. & Co., Ill. App. 1937.

In the last named case the appellate court said:

of various kinds of items and materials, including:

In other words, plainity is not in a position to object to the agreement submitted in behalf of defendant when she offered similar evidence just as objectionable from a scientific standpoint. We think that, considered as experiments showing supposed conditions at the time of the accident, the evidence of plainity was as worthless as that of defendant. We said she jury could reasonably find from the evidence in this case that the code plainity purchased (it from defendant company) were sold with a warning of their inflammable character, and that her injuries were the result of her own negligence. It would be quite impossible to say that the

The jury passed on the evidence. We hold there was no error which required another trial.

For these reasons the judgment is reversed and the cause remanded with directions to set aside the order allowing a new trial and to enter judgment for defendant on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

The first thing I saw when I stepped out of the car was a vast, open landscape. The hills were covered in a dense forest of tall, slender trees. The air was fresh and the sun was shining brightly.

I had heard that the scenery was beautiful, but I didn't realize how much I would enjoy it. The view was indeed spectacular. The hills were covered in a dense forest of tall, slender trees. The air was fresh and the sun was shining brightly.

I had heard that the scenery was beautiful, but I didn't realize how much I would enjoy it. The view was indeed spectacular. The hills were covered in a dense forest of tall, slender trees. The air was fresh and the sun was shining brightly.

37978

ELIZABETH H. MANNING,
Respondent,

vs.

F. W. WOOLWORTH CO., a Corporation,
and IRENE LEONARD PRUEITT,
Petitioners.

)
) PETITION FOR LEAVE TO
) APPEAL FROM CIRCUIT COURT
) OF COOK COUNTY.
)

279 I.A. 631³

MR. JUSTICE MATCHETT delivered the supplemental opinion of
the court.

After reading plaintiff's petition for a rehearing, we think
some further observations will not be amiss. The expert evidence
so much discussed in the briefs does not appear to us to be of
much, if any, importance. The attorneys, with the aid of the ex-
perts, seem to have waged a sham battle in that regard. Whether
celluloid is or is not an inflammable material can hardly be said
to have been the issue of fact on this record. The real issues of
fact, were, first, whether defendant sold the celluloid combs to
plaintiff, and, secondly, assuming that the same were sold, whether
defendants warned plaintiff of their inflammable character. The
jury decided these issues of fact against plaintiff. We do not
think it can be plausibly argued that the verdict upon these issues
is against the manifest weight of the evidence, and it does not seem
that a new trial should be given in order that evidence upon an
uncontested issue of fact may be presented in a better way.

The prayer of the petition for rehearing will therefore be
denied.

PETITION DENIED.

O'Connor, P. J., and McSurely, J., concur.

CLARENCE M. HAMILTON
Baltimore

RECEIVED THE JUDGE
OF THE COURT
AT BALTIMORE

U. S. DISTRICT COURT
AND TERRITORY OF MARYLAND
BALTIMORE

1891.11.08

MR. JUSTICE MATTHEW CALVERT the undersigned opinion of

FOR COURT.

After reading plaintiff's petition for a restraining order, we think
some further observations will not be amiss. The present evidence
as much discussed in the briefs does not appear to us to be of
much, if any, importance. The defendant, with the aid of the ex-
pert, seem to have waged a keen battle in that regard. Whether
celluloid is or is not an inflammable material can hardly be said
to have been the issue of fact on this record. The real issues of
fact, were, first, whether defendant sold the celluloid cases as
plaintiff, and, secondly, assuming that the same were sold, whether
defendants warned plaintiff of their inflammable character. The
jury decided these issues at fact against plaintiff. We do not
think it can be plaintiff's argument that the expert upon these issues
is against the defendant's weight of the evidence. And if that was
not a new trial would be given in order that evidence upon an
uncontested issue of fact may be presented in a better way.
The prayer of the petition for restraining will therefore be

Denied.

FOR THE COURT.

Witness, my hand and seal, this 8th day of November, 1891.

37419

CHARLES P. CAMPBELL and
MARSHALL CAMPBELL, as
trustees,

Defendants in Error,

v.

WILLIAM T. ALDEN, as adminis-
trator with the will annexed of
the estate of Maud R. D. Reinhardt,
deceased, HENRY G. W. REINHARDT,
JOSEPH A. JAEFICH, ABRAHAM D.
ROTHSCHILD, LILLIAN W. CANN,
JAMES B. CANN, MAURICE CANN,
JULIUS F. CANN, JEANNETTE C.
HIRSCH (alias "Jeannette C. Hirsch"),
ILLINOIS INDUSTRIAL HOME FOR THE
BLIND, a corporation (alias "The
Home for the Blind"), HOME FOR AGED
JEWS, a corporation (alias "Jewish
Old People's Home"), and CHICAGO
HOME FOR JEWISH ORPHANS, a cor-
poration (alias "Jewish Orphans'
Home"),

Plaintiffs in Error.

219 I.A. 631⁴

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants sued out a writ of error to review a decree entered by the Circuit court of Cook county December 15, 1933, foreclosing a trust deed to vacant real estate in the City of Chicago. Upon hearing of exceptions to the master's report filed by both sides, the chancellor sustained complainants' exceptions and overruled those of defendants, ordering foreclosure of the trust deed and a sale of the premises.

The essential facts disclose that August 2, 1927, Maud R. D. Reinhardt entered into an agreement with one W. F. Thompson, then a salesman employed by Campbell Investment Company, for the purchase of lots 8 and 9 in a section of

Chicago known as Beverly Hills for \$6,200, divided equally between the two parcels, and made a deposit of \$50, one-half of which was to apply on lot 9, the parcel under foreclosure.

During the period intervening between August 2nd and August 26th, 1927, Mrs. Reinhardt made sufficient payments on account of the purchase price to reduce the principal on lot 9 from \$3,100 to \$1,200. On the last mentioned date she received from Thompson a deed and guarantee policy issued by the Chicago Title & Trust Company, and simultaneously executed the trust deed in question, securing the payment of one principal promissory note for \$1,200, payable at the rate of \$35 or more a month, including interest at the rate of 6% per annum.

Mrs. Reinhardt paid Thompson \$70 on September 26, 1927, when the first installment became due, \$35 of which was to be applied on lot 9. She then went south for her health. At that time one Smalling was purchasing a bungalow from Mrs. Reinhardt under a contract, and paying \$70 each month thereon. During her absence from the city, and at her direction, Smalling paid to Thompson \$70 on October 26th, November 26th and December 26th, 1927, a total of \$210, one-half of which was to be applied on lot 9. Thompson, Marshall Campbell's brother-in-law, failed to turn over to Campbell Investment Company these three payments by Smalling, and two other items.

March 23, 1928, having returned from the south, Mrs. Reinhardt either mailed or delivered to Campbell Investment Co. her check for \$140. She testified that on the same day, after mailing the check, she proceeded downtown to deposit \$450 in cash with the First National Bank, but changed her mind and went to the office of Campbell Investment Co. where she paid said sum to Marshall Campbell, and received a receipt written out by Campbell, which is as follows:

Chicago Trust Co. (Chicago Trust Co., Chicago, Ill.)
between the two parties, and made a deposit of \$50, one-half
of which was to apply on Jan 1, the general interest.
During the period intervening between August 2nd and
August 25th, 1937, Mrs. Reinhardt made sufficient payments on
amount of the purchase price to reduce the principal on Jan 1
from \$3,100 to \$1,200. On the last mentioned date she received
from Thompson a deed and guarantee policy issued by the Chicago
Title & Trust Company, and simultaneously executed the same
and in question, regarding the payment of one principal payment
rate for \$1,200, payable at the rate of \$35 or more a month, in-
cluding interest at the rate of 6% per annum.
Mrs. Reinhardt paid Thompson \$75 on September 25, 1937,
and the first installment became due, \$35 of which was to be
applied on Jan 1. She then went north for her health. At that
time one Smelling was purchasing a bungalow from Mrs. Reinhardt
under a contract, and paying \$70 each month thereon. During her
absence from the city, and at her direction, Smelling paid to
Thompson \$70 on October 25th, November 25th and December 25th,
1937, a total of \$210, one-half of which was to be applied on
Jan 1. Thompson, Northern Trust Co., Chicago, Ill., failed to
hold over to Campbell Investment Company the same payments by
Smelling, and two other items.
March 25, 1938, having returned from the north, Mrs.
Reinhardt either mailed or delivered to Campbell Investment Co.
her check for \$140. She testified that on the same day, after
mailing the check, she proceeded downtown to deposit \$400 in cash
with the First National Bank, but changed her mind and went to
the office of Campbell Investment Co. where she paid over to
Northern Trust Co., and received a receipt written out by Campbell,
which is as follows:

"3-23-28

Received of Mrs. Maud R. D. Reinhardt, \$450.00, representing Oct. 1927 to Feb. 1928, inclusive, payment on two lots purchased on Hoyne Ave. - Payments of \$70 per month on each.

Campbell Investment Co.
Marshall Campbell."

Campbell denied that the foregoing receipt was given for a cash payment of \$450. He testified that Mrs. Reinhardt came into his office and stated that payments on the lots, amounting to \$210, had been made to Thompson; that she wished to make a payment; and that her total payments at that time, including the one she was to make, would be \$450; that she gave him a check for \$140, and he gave her the foregoing receipt "so that there would be no dovetailing of receipts."

The irreconcilable conflict of testimony between Mrs. Reinhardt and Campbell, relative to this transaction, raises the principal issue of fact in the case. If, as seems to be conceded, \$210 had been paid to Thompson and \$140 was then being paid to Campbell, as he stated, the total amount for which Mrs. Reinhardt was entitled to a receipt would obviously have been only \$350. Campbell's testimony fails to account for the \$100 difference and counsel's brief offers no explanation thereof.

During May or June, 1929, a dispute arose between Mrs. Reinhardt and Campbell as to the balance due on said lots. Mrs. Reinhardt claimed credit for a sum largely in excess of the amount due under the terms of the note and trust deed, while Campbell insisted that she was in arrears as to her payments of installments due on the note. Thereafter, July 24, 1929, Mrs. Reinhardt mailed her check for the July payment. The following day solicitors for complainants sent her a letter setting forth a statement of account which purported to show that there was a balance of \$568.94 still due, and that she owed "the June 26, 1929 and subsequent install-

ments." The letter then proceeds to say that, "on account of your default in payment of the installments on the trust deed on Lot 9, our client has declared the entire balance secured by that trust deed immediately due and payable, and expects us to collect it immediately or start suit therefor."

Mrs. Reinhardt thereupon sent complainants her check for \$70, dated August 2, 1929. This check was returned in a letter from complainants' solicitors, in which they stated that because of her default in payment of installments suit had been commenced and that complainants would not accept anything less than the entire amount (namely, \$568.94) plus the court costs. The suit to which reference is made was an action at law on the note, brought by complainants in the Superior court of Cook county July 30, 1929, which was pending throughout the course of the foreclosure proceedings. The suit having failed to result in the payment of the balance claimed to be due complainants, foreclosure proceedings were instituted in the circuit court October 17, 1929.

By the decree of the court defendants were ordered to pay the sum of \$1,121.94 and costs, including master's fees of \$107, as the price of retaining the realty involved, upon which it is conceded by complainants that Mrs. Reinhardt paid \$2,635 on account of the purchase price of \$3,100.

The communication from complainants' solicitors of July 25, 1929, preceding by one day the commencement of suit on the balance claimed to be due, included an account of payments credited to Mrs. Reinhardt and stated that, "you have made 20 payments of \$35.00 each on account of same. (The trust deed.) From Sept. 26, 1927 to July 26, 1929, both inclusive, is 23 monthly installments. Therefore you still owe the June 26, 1929 and subsequent installments." However, the June, 1929, installment had been paid and credited, so that the most claimed by complainants when they

months." The letter then proceeds to say that, "on account of your failure to respond to the invitation of the first trial on July 2, our client has declared the entire balance secured by that court does immediately due and payable, and expects us to collect it immediately on demand with interest."

The defendant's answer was filed on July 10, 1933.

The first trial was held on July 10, 1933, and resulted in a

verdict from complainant's side, in which they stated that because of her default in payment of installments suit had been commenced and that complainant would not accept anything less than the value of the property, \$100.00, plus the court costs.

The suit to which reference is made was an action at law on the note, brought by complainant in the Superior Court of Cook County, July 20, 1932, which was pending throughout the course of the

foreclosure proceedings. The suit having failed to result in the payment of the balance claimed to be due complainant, foreclosure proceedings were instituted in the circuit court October 17, 1932.

By the decree of the court defendant was ordered to

pay the sum of \$1,121.04 and costs, including master's fees of \$107, as the price of retaining the property involved, upon which it is conceded by complainant that Mrs. Weinhardt paid \$4,000 on account of the purchase price of \$5,100.

The communication from complainant's solicitors of July

22, 1932, proceeding by one day the commencement of suit on the balance claimed to be due, included an account of payments credited to Mrs. Weinhardt and stated that, "you have made 30 payments of

\$33.00 each on account of same. (The first due.) From Sept. 26, 1927 to July 26, 1932, both inclusive, is 30 monthly installments. Therefore you still owe the sum \$5,100 and subsequent installments." However, the June, 1932, installment had been paid and

admitted, so that the most claimed by complainant when they

ordered their solicitors to accelerate the indebtedness was a default of two items for \$35 each and aggregating \$70.

The master stated that "a careful inspection of the testimony, together with the cancelled checks and other exhibits offered by the defendant, has convinced me that two of the payments claimed to have been made by the defendant to representatives of Campbell were not credited in this statement. These are the payments shown by the receipts of the salesman, E. F. Thompson, dated August 2nd, 1927 for \$50 and the check for \$140.00, dated March 23, 1928."

Complainants credited Mrs. Reinhardt with \$225 on lot 9 as of March 23, 1928, representing one-half of the \$450 for which she held a receipt. If, in addition to this sum, she was entitled to a credit of \$95, as the master found, representing one-half of the two items for \$140 and \$50, her credits would more than off-set the two items aggregating \$70 claimed to be due in the letter of July 25, 1929.

The chancellor by his decree overruled the master and disallowed both of these items. We believe he was not warranted in so doing. The allowance of the \$50 item by the master was clearly proper. Mrs. Reinhardt paid this sum to Thompson when the lots were purchased August 2, 1927, and had a receipt therefor. We find no countervailing evidence and no serious contention is made by complainants with reference thereto. The evidence as to the \$140 item is sharply conflicting and presents the only serious issue of fact in the case. The master heard the witnesses, which the chancellor did not, and was therefore better able than are we or the chancellor, to determine their credibility. Under the circumstances the chancellor, as well as the court of review, should be slow in disturbing the conclusions of the master upon close questions of fact. It has been uniformly so held by this

ordered their solicitor to prepare the indictment was a
 default of two items for \$25 each and aggregating \$50.

The master stated that "a careful inspection of the

account, together with the master's books and other exhibits
 offered by the defendant, has convinced me that two of the pay-
 ments claimed to have been made by the defendant to representatives
 of Campbell were not credited in this statement. These are the
 payments shown by the receipts of the salesman, R. W. Thompson,
 dated August 2nd, 1927 for \$50 and the check for \$140.00, dated

Complainant credited Mrs. Reinhardt with \$250 on Jan

1st of March 1928, representing one-half of the \$500 tax
 which she held a receipt. If, in addition to this sum, she was
 entitled to a credit of \$50, as the master found, representing
 one-half of the two items for \$140 and \$50, her credits would
 more than offset the two items aggregating \$70 claimed to be
 due in the letter of July 25, 1928.

The chancellor by his decree overruled the master and
 disallowed both of these items. He believed he was not warranted
 in so doing. The allowance of the \$50 item by the master was
 clearly proper. Mrs. Reinhardt paid this sum to Thompson when
 the lots were purchased August 2, 1927, and had a receipt there-
 for. To find an unallowable balance and no return of evidence
 is made by complainant with reference thereto. The evidence as
 to the \$140 item is simply conflicting and presents the only
 serious issue of fact in the case. The master heard the witnesses,
 asked the questions and saw the evidence but still when
 we are on the chancellor, to determine their credibility. Under
 the circumstances the chancellor, as well as the court of review,
 should be able in distending the conclusions of the master upon
 these questions of fact. It has been uniformly the rule of this

court. (Meyer v. Levy, 249 Ill. App. 408; Katz v. Davis, 134 Ill. App. 436; Wechsler v. Gidwitz, 250 Ill. App. 136.) And we believe the court should have given effect to the master's findings, notwithstanding the unwarranted and altogether improper insinuation made by counsel in complainants' brief that, "The record was not such as to induce the court to give any undue effect to the findings of the master. The defendant, Henry C. W. Reinhardt, now deceased, was a former coroner's physician who lived in the same ward as the master, and that undoubtedly placed the master in a very embarrassing position."

Moreover, it should be noted that complainants were rather lax in keeping the records of this transaction. The \$1,200 note was not produced at the hearing and Campbell testified that it had been lost. The initial payment of \$50, hereinbefore referred to, was not credited to the account, although there is no contention by complainants that Mrs. Reinhardt did not pay it. And the several installments paid to Thompson by Smalling were never turned in to Campbell, and if they were credited at all, it was only when defendants called Campbell's attention thereto.

From the foregoing circumstances, we are of the opinion that Mrs. Reinhardt was not in default when the superior court suit was instituted against her. The master's finding that there was sufficient default when the bill was filed on October 17, 1929, to warrant the acceleration of the entire principal, was evidently based on a misapprehension arising from the omission of payments after July, 1929. However, Mrs. Reinhardt tendered the August payment, which was returned to her by complainants' solicitors with the statement that no further payments would be received unless she paid the entire balance of \$568.94 then claimed to be due. Complainants having thus refused to accept anything

court. (Wright v. Wright, 100 Ill. App. 400; Baker v. Baker, 104 Ill. App. 436; Wright v. Wright, 100 Ill. App. 400, 104 Ill. App. 436.) And we believe the court should have given effect to the master's findings, notwithstanding the uncorroborated and altogether inconclusive testimony made by counsel in complainant's brief. The record was not such as to induce the court to give any weight effect to the findings of the master. The defendant, Henry C. W. Reinhardt, now deceased, was a former partner's physician who lived in the same ward on the master, and that undoubtedly placed the master in a very embarrassing position."

Moreover, it should be noted that complainant were rather lax in keeping the records of this transaction. The \$1,200 note was not produced at the hearing and Campbell testified that it had been lost. The initial payment of \$50, however, was returned to, was not credited to the account, although there is no contention by complainant that Mrs. Reinhardt did not pay it. And the several installments paid to Thompson by mailing were never turned in to Campbell, and if they were credited at all, it was only when defendant called Campbell's attention thereto.

From the foregoing circumstances, we are of the opinion that Mrs. Reinhardt was not in default upon the master's note and was entitled against her. The master's finding that there was sufficient detail when the bill was filed in October, 1908, to warrant the prosecution of the entire principal, was evidently based on a misapprehension arising from the omission of payments after July, 1908. However, Mrs. Reinhardt testified the August payment, which was returned to her by complainant, and the statement that no further payments would be received unless she paid the entire balance at once, to have placed in the hands of complainant having that value in August, 1908.

less than the entire amount, Mrs. Reinhardt was not bound to tender each remaining installment as it fell due. (See Gorham v. Farnon, 119 Ill. 425, 442.) Accordingly, she was not in default when the foreclosure proceeding was instituted October 17, 1929, and it was prematurely brought.

Prior to the entry of the decree Mrs. Reinhardt died and William T. Alden was appointed her administrator with the will annexed. Henry G. W. Reinhardt, her husband and co-maker of the note and one of the parties to the original proceeding, died since the suing out of the writ of error herein, and his heirs have been substituted in his place as plaintiffs in error. Complainants contend that none of the defendants is in a position to insist upon the ground for reversal urged in their brief, because (1) William T. Alden, as administrator, etc., is not interested in the decedent's realty, and therefore the decree cannot affect his interest; and (2) because it does not appear that Henry G. W. Reinhardt filed any renunciation, under Mrs. Reinhardt's will, within the statutory year, nor that the will devised to him the real estate herein involved or any interest therein, and therefore his heirs are in no position to claim any error prejudicial to them.

A sufficient answer to the first contention is that the administrator was voluntarily joined as a party defendant and complainants then having procured the entry of a finding against him that none of the defendants is entitled to credit for any payment claimed to have been made on the note, other than that given in the admission by complainants, they are in no position to deny the administrator's interest in the outcome of the suit, nor to assert that the finding will not affect him adversely in the performance of his duties.

that the entire amount, \$100,000, was not paid to
 under such remaining installment as is left due. (See Exhibit

v. Winters, 112 Ill. App. 422, 423.) Accordingly, she was not in
 default when the foreclosure proceeding was instituted October
 17, 1923, and it was prematurely brought.

Twice in the entry of the decree Mrs. Reinhardt died
 and William F. Allen was appointed her administrator with the
 will annexed. (Exhibit A, v. Reinhardt, 112 Ill. App. 422, 423.)

of the note and one of the parties to the original proceeding,
 also since the entry and of the writ of error herein, and his
 heirs have been substituted in his place as plaintiff in

error. Complainant's content that none of the defendants is in
 a position to insist upon the ground for reversal urged in their
 brief, because (1) William F. Allen, as administrator, etc., is

not interested in the deceased's estate, and therefore the decree
 cannot affect his interest; and (2) because it does not appear that
 Mrs. F. W. Reinhardt died any money/claim when Mrs. Reinhardt's

will, within the statutory year, nor that she will devolve to him
 for real estate herein involved or any interest therein, and there-
 fore his heirs are in no position to claim any error prejudicial

to them.
 A sufficient answer to the first contention is that the
 defendant's and complainant's claim is a party defendant and

complainant's bond having provided the entry of a final judgment
 and that none of the defendants is entitled to credit for any pay-
 ment claimed to have been made on the note, other than that made

in the satisfaction of complainant's, they are in no position to deny
 the administrator's interest in the outcome of the suit, nor to
 assert that the finding will not affect him adversely in the per-

formance of his duties.

In Harvey v. Thornton, 14 Ill. 217, the administrator was the sole party defendant to a suit to foreclose the mortgage, and sued out a writ of error to reverse the decree on the ground that the heirs of a mortgagor had not been joined with him as party defendant. The court held that the heirs were indispensable parties to the proceeding, and reversed the decree. The right of the administrator to prosecute the writ of error seems to have been assumed, and we find no authority to the contrary in complainants' brief.

As to the second contention, the record discloses that Henry G. W. Reinhardt joined with his wife in an answer to complainants' bill, and also joined with the defendant William T. Alden, as administrator, in filing exceptions to the master's report, and to the assignment of errors in this court. No motion was ever made prior to the death of Henry G. W. Reinhardt to dismiss him from the suit. This would have been the proper procedure, if in fact he had no interest in the premises. (Richardson v. Hadsall, 106 Ill. 476, 481.) Moreover, Mrs. Reinhardt's will was not introduced in evidence, and the record fails to disclose whether the premises involved were devised under the will or devolved upon the heirs at law as intestate property. If Henry G. W. Reinhardt was the devisee of the premises by will, he would certainly have been an indispensable party to the suit. If the premises were not disposed of by will he was a proper and necessary party as an heir at law of Mrs. Reinhardt.

For the foregoing reasons the decree of the circuit court will be reversed and the cause remanded with directions to dismiss the bill of complaint for want of equity at complainants' costs.

REVERSED AND REMANDED.

Scanlan and Sullivan, JJ., concur.

In Henry v. Thompson, 14 Ill. 219, the administrator

was the sole party defendant to a bill to foreclose the mortgage,

and used not a writ of error to reverse the decree on the ground

that the heirs of a mortgagor had not been joined with him as

party defendant. The court held that the heirs were indispensable

parties to the proceeding, and reversed the decree. The right of

the administrator to prosecute the writ of error seems to have been

assumed, and we find no authority to the contrary in complaints.

As to the second contention, the record discloses that

Henry G. W. Reinhardt joined with his wife in an answer to com-

plaintant's bill, and also joined with the defendant William T.

Allen, as administrator, in filing exceptions to the master's report,

and to the assignment of errors in this court. No motion was ever

made prior to the death of Henry G. W. Reinhardt to dismiss him from

the suit. This would have been the proper procedure, if in fact

he had no interest in the premises. (Richardson v. Kneass, 106

Ill. 470, 481.) Moreover, Mrs. Reinhardt's will was not introduced

in evidence, and the record fails to disclose whether the premises

involved were devised under the will or devolved upon the heirs at

law as intestate property. If Henry G. W. Reinhardt was the devisee

of the premises by will, he would certainly have been an indispensable

party to the suit. If the premises were not disposed of by will he

would be a proper and necessary party as an heir at law of Mrs. Reinhardt.

For the foregoing reasons the decree of the circuit court

will be reversed and the cause remanded with directions to dismiss

the bill of complaint for want of equity of complaintants' costs.

37431

FELIX MATAREBBE,
Defendant in Error,

v.

DR. ATTILIO MONACO,
Plaintiff in Error.

857
} ERROR TO SUPERIOR
COURT, COOK COUNTY.

279 I.A. 631⁵

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trespass on the case against defendant in the superior court for alienating his wife's affections. The cause was tried before the court and a jury, resulting in a verdict and judgment for \$6,500. This writ of error is brought to reverse said judgment.

Plaintiff's declaration, consisting of two counts, alleged in brief that plaintiff and his wife lived happily together following their marriage in September, 1923, until shortly before the birth of their first child, Felix, when defendant, a physician, was called in to attend her and thereafter became a constant visitor in plaintiff's home; that said defendant, by design, wickedly, maliciously and unlawfully overcame the love and devotion of plaintiff's wife for her husband, and secretly had carnal knowledge of her at various times and places; and that as a result of defendant's conduct plaintiff's wife abandoned plaintiff and their home, taking their sons with her. To this declaration defendant filed a plea of the general issue.

The undisputed facts disclosed by the record show that plaintiff and his wife were married in September, 1923. Plaintiff was then 27 years of age, and his wife 17. Two children were born

1931

IN SENATE
JANUARY 10, 1931

V.

MR. ATTORNEY GENERAL,
PLAINTIFF IN ERROR.

SENATE TO SENATOR
DOCKET, COURT REPORT.

279 I.A. 681

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trespass on the case

against defendant in the superior court for allowing his wife's reflections. The cause was tried before the court and a jury, resulting in a verdict and judgment for \$6,500. This writ of error is brought to reverse said judgment.

Plaintiff's declaration, consisting of two counts,

alleges in brief that plaintiff and his wife lived together before falling into marriage in 1914, and that before the birth of their first child, John, when defendant, a physician, was called in to attend her and thereafter became a constant visitor in plaintiff's home; that said defendant, by design, wickedly, maliciously and unlawfully overcame the love and devotion of plaintiff's wife for her husband, and secretly had carnal knowledge of her at various times and places; and that as a result of defendant's conduct plaintiff's wife abandoned plaintiff and their home, taking their sons with her. To this declaration defendant filed a plea of the general issue.

The undisputed facts disclosed by the record show that plaintiff and his wife were married in September, 1913. Plaintiff was then 27 years of age, and his wife 17. Two children were born

of said marriage, one November 2, 1925, and the other February 8, 1929. Plaintiff was a barber, and managed a shop in the office building of the Chicago & Alton railroad. The parties resided at 1456 W. Polk street in Chicago until the time of their separation, April 7, 1931.

Defendant was their family physician, and delivered both babies, the first - Felix, Jr., - at their home, and the second - Carl - at the Frances Willard hospital. During the period from 1927, until the separation of the parties in 1931, defendant frequently took plaintiff, his wife, her mother and the child or children for rides in his automobile.

In June, 1931, plaintiff sued his wife for divorce, charging adultery with defendant. A cross bill, charging desertion, was filed by the wife. The court entered a decree in June, 1933, dismissing plaintiff's bill for want of equity, and entering a decree for divorce on the cross bill, directing payment of alimony.

In July, 1931, defendant sued plaintiff in the municipal court for medical services rendered, to which plaintiff filed a set-off. No damages were awarded to either side.

Following the divorce proceeding between the parties, plaintiff's wife lived separately with their two children, and under the decree plaintiff was permitted to visit the children on specified occasions.

From a voluminous record of more than 400 pages there appears evidence of numerous occurrences related by various witnesses, relied upon to sustain plaintiff's charges and denied by defendant.

Plaintiff testified that as early as 1927 defendant called at his home, advised him that his wife was anemic, suggested that he be permitted to treat her at his office, told plaintiff he

of said marriage, one November 2, 1930, and the other February 2, 1931. Plaintiff was a barber, and managed a shop in the office building of the Chicago & North Western. The parties resided at 1836 V. Park Street in Chicago until the time of their separation, April 7, 1931.

Defendant was their family physician, and delivered both children, the first - William, Jr., - at their home, and the second - Mary - at the Chicago General Hospital. During the period from 1927, until the separation of the parties in 1931, defendant frequently took Plaintiff, his wife, her mother and the child or children for rides in his automobile.

In June, 1931, Plaintiff sued his wife for divorce, seeking custody of the children. A writ was granted, and the case was filed by the wife. The court entered a decree in June, 1932, dissolving Plaintiff's bill for want of equity, and granting a decree for divorce on the cross bill, directing payment of alimony.

In July, 1931, defendant sued Plaintiff in the municipal court for medical services rendered, in which Plaintiff filed a cross-bill. No damages were awarded to either side.

Following the divorce proceeding between the parties, Plaintiff's wife lived separately with their two children, and when the decree Plaintiff was permitted to visit the children on specified occasions.

From a voluminous record of more than 400 pages there appears evidence of numerous occurrences related by various witnesses, relied upon to sustain Plaintiff's charges and denied by defendant.

Plaintiff testified that he was on duty on July 1, 1931, at his home, advised him that his wife was coming, and that he be permitted to have her on his office, and Plaintiff was

had a beautiful wife, who "should go into a moving picture," and thereafter made like comments every time he took plaintiff's family for automobile rides.

There is evidence that in June or July, 1927, when the family went for a ride defendant stopped his car at Van Buren street and Plymouth court, around midnight, plaintiff went into a drug store to buy some refreshments for the family, and when he returned defendant and plaintiff's wife were embracing; that defendant seemed "all nervous, and didn't know what to say," and when plaintiff remarked, "It surprised you," defendant said nothing, and they drove straight home. The same night plaintiff observed a scratch on his wife's face, 2 or 3 inches long, which had not been there before they left for the ride. Plaintiff further stated that when he asked his wife what was going on between her and the doctor, she replied, "Nothing," and denied the occurrence related.

Plaintiff further testified that several days later defendant telephoned him and made an appointment to meet him that evening; that when they met defendant said, "Felix, I want an apology from you," to which plaintiff replied, "Why, what is the matter, doctor?;" that defendant then continued, "The way you acted last night, you acted queer," to which plaintiff again replied, "I have a reason to act that way;" that in the course of the conversation defendant finally said, "If I am wrong we are going to see about it, if I am wrong. Lets be a friend. I don't want you to have hard feelings - we want to be a friend;" and that after the incident the family went out riding again with defendant on many occasions.

It further appears from the evidence that plaintiff had rented a cottage at Long lake, Illinois, during the month of August, 1929, and for several summers prior thereto, where his family remained during those periods and plaintiff visited them there on Saturday evenings and Sundays; that in 1929 defendant asked plaintiff

had a beautiful wife, who "should be into a young person," and
thereafter made like someone every time he took Plaintiff's
family for a walk in the
There is evidence that in June or July, 1937, when the
family went for a ride defendant stopped his car at Van Horn
street and Plaintiff went, around midnight, Plaintiff went into a
drug store to buy some refreshments for the family, and when he
returned defendant and Plaintiff's wife were standing; that
defendant seemed "all nervous, and didn't know what to say," and
then Plaintiff testified, "I suggested you," defendant said nothing,
and they drove straight home. The same night Plaintiff observed a
scratch on his wife's face, 2 or 3 inches long, which had not been
there before they left for the ride. Plaintiff further stated that
when he asked his wife what was going on between her and the doctor,
she replied, "Nothing," and denied the occurrence related.
Plaintiff further testified that several days later defendant
and telephoned him and made an appointment to meet him that evening;
that when they met defendant said, "Well, I want an apology from
you," to which Plaintiff replied, "Yes, that is the matter, I want
that defendant then continued, "The way you acted last night, you
acted queer," to which Plaintiff again replied, "I have a reason for
not that way," that in the course of the conversation defendant
finally said, "If I am wrong we are going to see about it, if I am
wrong, I don't want you to have hard feelings -
we want to be a friend," and that after the incident the family went
and riding again with defendant on many occasions.
It further appears from the evidence that Plaintiff had
rented a cottage at Long Lake, Illinois, during the month of August,
1937, and the several nights prior to when the family re-
turned during those nights and Plaintiff testified that there on
Saturday evenings and Sundays; that in 1938 defendant asked Plaintiff

when his family was going away, and was told that they would be leaving shortly; that defendant then advised plaintiff that his wife still had a discharge from the birth of their second child, and later defendant visited plaintiff's wife at Long lake and upon his return told plaintiff that his wife did not look very well and that he would advise a further examination in the near future; that subsequent examinations of both plaintiff and his wife, and laboratory tests, showed gonorrheal infections, and when defendant intimated to plaintiff that his wife may have contracted the disease from plaintiff the latter said it was impossible, that he had been married eight years and that he proposed to find out how this happened, to which the doctor replied, "I am not sure, it must be in the water. This thing can always happen;" that on said occasion in the doctor's office plaintiff's wife arose from the chair and said to defendant, "You did it," whereupon, according to plaintiff's testimony, defendant turned pale and ran out of his office; that two weeks thereafter, when plaintiff again visited the doctor's office, the latter said, "You are a good friend of mine. Your wife accused me of giving sickness with the tools. I know my tools are well sterilized," to which plaintiff replied, "I don't know what she referred to. I know she accused you."

Plaintiff's second boy, Carl, was baptized May 5, 1929. Notwithstanding the fact that there were several Italian churches in the immediate neighborhood of plaintiff's home, defendant suggested that the baby be baptized at St. Paul's church, on west 22nd street, saying, "We better find a church farther away from the house. It is better people don't know it, so you don't spend any money. Lets get a church far away from the house." When they arrived at St. Paul's church in defendant's automobile, the latter said to plaintiff, "You wait here, we will be out right away," and thereupon plaintiff's wife, her mother, the defendant and both children went into the

then his family was going away, and was told that they would be
 leaving early; that defendant then turned plaintiff's head
 with still had a discharge from the birth of their second child,
 and later defendant visited plaintiff's wife at home and upon
 his return told plaintiff that his wife did not look very well and
 that he would advise a further examination in the next morning; that
 subsequent examinations of both plaintiff and his wife, and defendant
 very soon, showed gonorrheal infection, and when defendant later
 noted to plaintiff that his wife may have contracted the disease
 from plaintiff the latter said it was impossible, that he had been
 married eight years and that he proposed to him and his wife
 happened, to which the doctor replied, "I am not sure, it may be
 in the water. This thing can always happen; that on said occasion
 in the house's wife plaintiff's wife never from the other and
 said to defendant, "You did it," whereupon, according to plaintiff's
 testimony, defendant turned pale and ran out of his office; that two
 weeks thereafter, when plaintiff again visited the doctor's office,
 the latter said, "You are a good kind of man. Your wife recovered
 me of giving sickness with the soles. I know my soles are well
 established," to which plaintiff replied, "I don't know that she
 recovered yet. I know the soles are well."
 Plaintiff's second wife, said, was visited by Dr. Lusk,
 notwithstanding the fact that there were several Italian children
 in the immediate neighborhood of plaintiff's home, defendant suggested
 that the baby be baptized at St. Louis's church, on West 30th Street;
 saying, "No better than a church further away from the house. It is
 better people don't know it, so you don't spend any money. Let's
 get a church far away from the house." When they arrived at St.
 Louis's church in defendant's automobile, the latter said to plaintiff,
 "We are here, we will be out right away," and thereupon plaintiff's
 wife, her mother, the defendant and both children went into the

church, while plaintiff remained outside, and returned in about 25 minutes. The defendant acted as godfather, and Maria Michenzi, plaintiff's wife's mother, as godmother, at the baptism. Defendant gave the priest fictitious names for himself and Mrs. Michenzi as sponsors, using the alias of Antonio Corsica for himself and Maria Botania for the godmother. After the baptism defendant took the family to a roadhouse for dinner, and cautioned plaintiff, "Do not say anything to anybody. You call me Compare (godfather). Do not call me doctor any more. Call me Compare once in a while."

Frank Pallaria, uncle of plaintiff's wife, testified that in January, 1930, he passed by a room occupied by plaintiff's wife, and through an open door saw defendant embracing and kissing her. That she was in bed, clothed in pajamas. That this occurred about 3 or 4 o'clock in the afternoon, and that he was standing approximately 3 feet from the open door when he witnessed said occurrence; that his sister, Rose Michenzi, was in the kitchen, and plaintiff's wife was in the room together with defendant about 10 or 15 minutes.

Maria Michenzi testified that in May, 1929, when Carl, the second child was learning to walk, she accompanied plaintiff's wife and the child to defendant's office; that upon being refused admittance by defendant, plaintiff's wife broke the glass in the door with her purse and said to defendant, "This is your child," and pushed the child into the office; that defendant pushed Carl out again, and remarked, "I will see whether you are going to be independent or not. * * * Small fish can never eat the big fish," to which plaintiff's wife then responded, "I will make you pay for it, because it is bad. You have ruined my life;" that there then ensued a lengthy discussion wherein defendant told plaintiff's wife that he intended to marry her after divorcing his own wife.

Mrs. Michenzi further testified that on the day prior to the foregoing incident she was at the defendant's office herself and

stayed, while Elizabeth remained outside, and returned in about 25 minutes. The defendant asked me whether, and Maria Michaela, Elizabeth's wife's mother, as Godmother, as the defendant gave the witness Elizabeth asked the witness whether she was opposite, using the alias of Antonio Gervasio for himself and Maria Michaela for the Godmother. After the witness defendant asked the witness to a restaurant for dinner, and mentioned Elizabeth, "he not pay anything to anybody. You call me Giuseppe (Godfather). He not call me brother any more. Call me Giuseppe once in a while."

Witness Michaela, alias of Elizabeth's wife, testified that in January, 1930, he passed by a room occupied by Elizabeth's wife, and Elizabeth he was then was defendant's daughter and living there that she was in bed, dressed in pajamas. That date occurred about 7 or 8 o'clock in the afternoon, and that he was standing approximately 5 feet from the open door of Elizabeth's room, and that he saw Elizabeth, her husband, was in the kitchen, and Elizabeth's wife was in the room together with defendant about 10 or 15 minutes.

Maria Michaela testified that in May, 1930, when Court the witness still was living in the city, the defendant Elizabeth's wife and the child to defendant's office; that upon being refused entrance by defendant, Elizabeth's wife threw the glass in the door with her hands and said to defendant, "This is your child," and pushed the child into the office; that defendant pushed Court out again, and remarked, "I will see whether you are going to be independent or not. * * * Small child can never eat the big fish," to which Elizabeth's wife then responded, "I will make you pay for it, because it is well. You have ruined my life," that there then ensued a highly dissension wherein defendant told Elizabeth's wife that he intended to marry her after divorcing his own wife.

Elizabeth further testified that on the day prior to the foregoing incident she was at the defendant's office herself and

that he asked her what she wanted, to which she replied, "You know what I want. That stuff does not belong in the home of the Matarreses," whereupon the doctor ordered her to "get out of my office," and struck her.

In April, 1931, approximately two years after the two foregoing incidents, the parties separated. Defendant came to Rose Michenzi's home with plaintiff's wife. A quarrelsome conversation ensued, wherein Rose Michenzi said to plaintiff's wife, "What did you need to do such a terrible thing? Didn't you have a good husband and a good companion?" Frank Pallaria testified that on said occasion he heard Mrs. Maria Michenzi say to defendant, "That is your boy and not Mr. Matarrese's boy," and that he, Pallaria, then asked defendant, "What are you going to do now," to which defendant replied, "We will take it as it comes;" that Rose Michenzi then said to defendant, "Shame on you, a married man like you, - an old man like you, to ruin Mr. Matarrese's house." That defendant said nothing in answer to the last remark, but took plaintiff's wife away in his automobile.

Defendant denied the incidents alleged to have occurred at Plymouth place and Van Buren street in 1927, stated that he continued to be the physician for plaintiff's family until 1931, that he visited plaintiff's barber shop until shortly before the separation, and that plaintiff had never said anything to him with reference to his wife; admitted treating plaintiff's wife for anemia in 1928, but denied participation in the baptismal rites of Carl, or that he was present at St. Paul's church; denied the occurrence at Rose Michenzi's home in January, 1931, testified to by Pallaria; denied the conversation alleged to have taken place in the Rose Michenzi home at the time of the separation, or that he walked out with plaintiff's wife, stating that he left the house alone; and denied, generally, that he had made advances to plaintiff's wife,

that he asked her what she wanted, to which she replied, "You know what I want. That staff does not belong in the home of the mistress," whereupon the doctor ordered her to "get out of my office," and struck her.

On April, 1931, approximately five years after the last foregoing incident, the parties separated. Defendant came to Rose Michael's home with plaintiff's wife. Defendant's own version ensued, wherein Rose Michael said to plaintiff's wife, "What did you need to do such a terrible thing? Didn't you have a good husband and a good companion?" Frank Kallman testified that on said occasion he heard Mrs. Marie Michael say to defendant, "That is your boy and not Mr. Michael's boy," and that he, Kallman, then asked defendant, "What are you going to do now," to which defendant replied, "We will take it as it comes," that Rose Michael then said to defendant, "I mean to you, a married man like you, an old man like you, to ruin Mr. Michael's house." That defendant said nothing in answer to the last remark, but took plaintiff's wife away in his automobile.

Defendant denied the incidents alleged to have occurred at various times and on various dates in 1927, stated that he was living in the hospital for plaintiff's family until 1931, that he visited plaintiff's doctor shop until shortly before the separation, and that plaintiff had never said anything to him with reference to his wife; admitted treating plaintiff's wife for anemia in 1928, but denied participation in the baptismal rites of Gert, or that he was present at St. Paul's church; denied the occurrence at Rose Michael's home in January, 1931, testified to by Kallman; denied the conversations alleged to have taken place in the Rose Michael home at the time of the separation, or that he walked out with plaintiff's wife, stating that he left the house alone; and denied, generally, that he had made advances to plaintiff's wife.

kissed or hugged her, or had sexual relations with her at any time.

It is defendant's principal contention that the verdict was against the manifest weight of the evidence. We have carefully examined the record, and while there is a conflict as to the principal occurrences heretofore related, we believe there is abundant evidence in the record to support the verdict, if the testimony of plaintiff's witnesses is to be believed. Most of these witnesses were closely related to plaintiff's wife, and would not be likely to testify falsely as to matters affecting her moral misconduct. The law is well settled that where the evidence is conflicting, the jury's verdict will not be disturbed unless it is manifestly against the weight of the evidence. (Voellinger v. Kohl, 261 Ill. App. 271, 274.)

It is further contended that plaintiff's counsel made improper remarks in his opening statement to the jury and in the course of the trial. There was considerable bickering between counsel all through the trial, and many remarks were made on both sides of the table, but from an examination of the record we do not regard these as having been prejudicial.

Rose Michenzi was called as a witness on behalf of plaintiff, and after being examined by plaintiff was partially examined by defendant's counsel, and before the cross-examination had been completed plaintiff's attorney made a motion to strike all her testimony from the record. The defendant made no objection, and the court dismissed the witness. Defendant now complains of this procedure, but we think his complaint comes too late. Defendant should have made his objection at the proper time, instead of standing by and allowing the court to sustain plaintiff's motion and ordering the witness to leave the stand.

Various other questions are raised by defendant's brief,

himself or begged her, or had sexual relations with her at any

time.

If it is defendant's principal contention that the witness was against the weight of the evidence, he must carefully examine the record, and while there is a conflict as to the weight of defendant's statements related, we believe there is abundant evidence in the record to support the verdict, if the testimony of Plaintiff's witnesses is to be believed. None of these statements were closely related to Plaintiff's wife, and could not be likely to testify falsely as to matters affecting her sexual relationship. The law is well settled that where the evidence is conflicting, the jury's verdict will not be disturbed unless it is manifestly against the weight of the evidence. (Yarborough v. Kelly, 201 Ill. App.

211, 212.)

It is further submitted that Plaintiff's counsel made improper remarks in his opening statement to the jury and in the course of the trial. There was considerable discussion between counsel all through the trial, and many remarks were made on both sides of the table, but from an examination of the record we do not regard these as having been prejudicial.

None of these was called as a witness on behalf of Plaintiff, and after being examined by Plaintiff's counsel was examined by defendant's counsel, and before the cross-examination had been completed Plaintiff's attorney made a motion to strike all her testimony from the record. The defendant made no objection, and the court dismissed the witness. Defendant now complains of this procedure, but we think his complaint comes too late. Defendant should have made his objection at the proper time, instead of waiting until after the court had again Plaintiff's witness and allowing the witness to leave the stand.

Various other questions are raised by defendant's brief,

but they present no convincing reasons for reversal.

We believe the trial was fairly conducted, and finding no reversible error, the judgment will be affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

and they passed on peacefully towards the heavens.

It follows the trial was fairly conducted, and during

no reversible error, the judgment will be affirmed.

REVEREND.

ISSUED AND DELIVERED, this 11th day of

37556

LOUIS M. SHAPIRO,
Appellee,

v.

ROBERT EDELSON,
Appellant.

86 H
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

279 I.A. 632¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant seeks to reverse a judgment of the circuit court entered in a suit of trespass on the case on promises, founded upon a contract of guaranty. The cause was tried before the court without a jury, and the judgment rendered was for \$3,151.35.

Plaintiff filed a declaration consisting of four counts. The first and second counts allege that defendant guaranteed in writing the payment of merchandise shipped to Libbye's, Inc., to the extent of \$4,500, on which there remained due an unpaid balance of \$2,920.18. The third count alleges in substance that plaintiff was an officer and director of Shapiro-Baer, Inc., engaged in the business of acting as resident buyer for various persons engaged in selling, at retail, ladies' cloaks, suits and dresses, and as such resident buyer acted to make purchases for Libbye's, Inc., in New York city; that said defendant, in order to induce plaintiff to guarantee various manufacturers the payment for merchandise sold by them to Libbye's, Inc., at the special instance and request of Shapiro-Baer, Inc., did, December 13, 1931, execute and deliver to plaintiff the letters of guaranty in question; that pursuant thereto plaintiff guaranteed the payment of merchandise purchased

1934

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

v.

ROBERT HARRISON,
Plaintiff.

SOUTHERN DISTRICT OF NEW YORK

279 I.A. 632

THE COURT HEREBY FINDS THAT THE DEFENDANT IS GUILTY OF THE CRIME.

Defendant seeks to reverse a judgment of the circuit court entered in a suit of trespass on the case on grounds founded upon a contract of guaranty. The case was tried before the court without a jury, and the judgment rendered was for

\$7,125.00.

Plaintiff filed a declaration consisting of four counts. The first and second counts allege that defendant guaranteed in writing the payment of merchandise shipped to Liberty's, Inc., to the extent of \$4,500, on which there remained due an unpaid balance of \$2,989.12. The third count alleges in substance that plaintiff was an officer and director of Shapiro-Born, Inc., engaged in the business of selling as resident buyer for various persons engaged in selling, at retail, ladies' clothes, trunks and dresses, and as such resident buyer acted to make purchases for Liberty's, Inc., in New York City and sold defendant, in order to induce plaintiff to purchase various merchandise the payment for merchandise sold by him to Liberty's, Inc., at the special discount and payment of Shapiro-Born, Inc., and defendant, in 1931, cashed and deliver to plaintiff the balance of guaranty in question; that payment of said guaranty constituted the payment of merchandise purchased

as a resident buyer for Libbye's, Inc., upon which there remained due an unpaid balance of \$2,920.18, with interest at 3% per annum. Count four sets forth the common counts.

Defendant made a motion for a bill of particulars, which was furnished, and thereafter filed an affidavit of merits and two amended affidavits.

The essential facts disclose that defendant is a practicing lawyer in the city of Chicago; that his sister and nephew are the principal officers and owners of Libbye's, Inc., a corporation engaged in the retail ladies' ready to wear business in this city; that in December, 1931, Libbye's, Inc., was in a precarious financial condition, and could not get merchandise upon a credit basis; that defendant became acquainted with plaintiff through one Leo B. Sacks, a retailer engaged in a similar business, who died prior to the trial; that plaintiff for several years was engaged as a resident buyer in New York city, representing retail merchants throughout the United States in the New York market for whom he purchased merchandise upon commissions paid by the manufacturers, thus eliminating the necessity of his clients going to New York to make their purchases. And he testified that he had never been engaged in the manufacturing or jobbing business.

In order to make it possible for Libbye's, Inc., to procure merchandise from manufacturers on a credit basis, plaintiff told defendant that it would be necessary to obtain a guaranty, and thereupon the following written instrument of guaranty, dated December 18, 1931, was given by defendant to plaintiff:

"Confirming conversation with you when last in our city, I hereby guarantee the payment of the account of Libbye's, Inc., up to the extent of \$2,500. You may ship merchandise at any time they order hereafter up to that amount."

A second letter, dated February 8, 1932, increased the amount of the guaranty from \$2,500 to \$4,500.

as a resident payer for Liberty's, Inc., upon which there remained the an unpaid balance of \$2,500.00, with interest at 6% per annum. Court then set forth the common counts.

Defendant made a motion for a bill of particulars, which was furnished, and thereafter filed an affidavit of service and two amended affidavits.

The essential facts disclose that defendant is a

residing payer in the city of Chicago; that his sister and sister are the principal officers and owners of Liberty's, Inc., a corporation engaged in the retail ladies' ready to wear business in this city; that in December, 1931, Liberty's, Inc., was in a financial straitened condition, and would not pay merchandise when it was due; that defendant became acquainted with plaintiff

through one Leo M. Burke, a retailer engaged in a similar business, and that prior to the trial, plaintiff for several years was engaged as a resident payer in New York City, representing retail merchants throughout the United States in the New York market for whom he purchased merchandise upon commission paid by the merchant. Plaintiff, then eliminating the necessity of his clients going to New York to make their purchases, and he decided that he had never been engaged in the manufacturing or jobbing business.

In order to make it possible for Liberty's, Inc., to

continue its business, from December 18, 1931, to January 1, 1932, plaintiff advanced the following written instrument of promissory note, dated December 18, 1931, and given by defendant to plaintiff:

"Confirming conversation with you when last in New York, I hereby advance the sum of \$2,500.00 to the account of Liberty's, Inc., up to the extent of \$2,500.00. You may call this advance at any time for your business up to that amount."

A second letter, dated February 2, 1932, increased the amount of the advance from \$2,500 to \$4,000.

Plaintiff testified to a conversation with defendant wherein he (plaintiff) stated that in order to obtain merchandise from the manufacturers it would be necessary for him personally to guarantee the payment of bills which might be incurred for merchandise sold to Libbye's, Inc., and that he would not undertake to guarantee these bills unless he was sufficiently indemnified. Shortly after receiving the first guaranty, plaintiff wrote defendant, asking him for references. This letter was answered by defendant December 21, 1931, stating that lawyers are not usually rated by commercial or financial agencies, and asking plaintiff to disregard the usual business procedure, open up a line of credit for Libbye's, Inc., and handle the account in the same way that he was handling the Lee B. Sacks' account.

February 16, 1932, plaintiff wrote defendant, inquiring who the persons were that were interested in Libbye's, Inc., stating that this information was requested by various manufacturers from whom he had purchased merchandise, and that he would appreciate checks from Libbye's, Inc., for merchandise already purchased. Defendant answered this letter the following day, giving some information with reference to the corporate set-up of Libbye's, Inc. He further stated that he appreciated the difficulties attending the obtaining of credit, called attention to the fact that he had told plaintiff in advance that Libbye's, Inc., had no rating, and concluded by saying that in view of his guarantee the risk was good.

March 12, 1932, plaintiff came to Chicago for the purpose of getting some money for purchases and shipments theretofore made. He called at Edelson's office and received from the latter his check for \$2,000, on account. It was Edelson's contention that he had received \$2,000 in cash from Libbye's, Inc., which he offered to turn over to plaintiff, but that the latter said he did not wish to

plaintiff testified to a conversation with defendant
wherein he (plaintiff) stated that he knew of certain conversations
from the manufacturing it would be necessary for him personally
be guaranteed the payment of bills which might be incurred for raw
materials sold to Liberty's, Inc., and that he would not undertake
to guarantee these bills unless he was satisfactorily reimbursed.
Immediately after receiving the first payment, plaintiff made payment
and, making him for defendant. This latter was answered by Liberty's
on December 11, 1931, stating that Liberty's are not usually asked by
manufacturers as financial agencies, and asking plaintiff to discontinue
the usual business procedure, open up a line of credit for Liberty's,
Inc., and handle the account in the same way that he was handling the
Liberty's account.

February 14, 1932, plaintiff wrote defendant, informing
him the payment was not being made in Liberty's, Inc., stating
that this information was requested by various manufacturers from
whom he had purchased merchandise, and that he would appreciate
hearing from Liberty's, Inc., for merchandise already purchased.
Defendant created this letter the following day, which was in-
cluded with reference to the payment set-up of Liberty's, Inc.
He further stated that he appreciated the defendant's statement
the obtaining of credit, which according to him that time he had
sold plaintiff in various that Liberty's, Inc., had no credit, and
concluded by saying that he was of the opinion that the time was past
when it, Liberty's, Inc., plaintiff was so slow for the purpose
of existing with Liberty's, Inc., and defendant's statement was
no longer at defendant's office and received from the latter his check
for \$7,000, on account. It was defendant's contention that he had
received \$7,000 in cash from Liberty's, Inc., which he stated he
then gave to plaintiff, but that the latter said he did not want to

carry so much currency on his person, whereupon Adelson gave him a check and later deposited the cash in his personal account.

It appears from the record that the bill of particulars furnished by plaintiff showed in detail the names of the manufacturers and the amounts of their respective bills, the total merchandise which had been delivered to Libbye's, Inc., and the credit of \$2,000 paid on account.

The defendant takes the position that plaintiff had represented himself to be engaged in the jobbing business and proposed to sell merchandise to Libbye's, Inc.; that he did not know that plaintiff was a resident buyer acting merely as a sales representative; and that, based upon these representations he signed the guarantee in question, which he contends is clear and only covers merchandise shipped by plaintiff and not that shipped by manufacturers from whom plaintiff purchased as sales representative for Libbye's, Inc. Defendant complains because the court permitted plaintiff to testify to conversations leading up to the execution of the guarantee, and insists that such evidence was inadmissible as tending to vary the written contract between the parties.

Plaintiff, on the other hand, contends that the meaning of the contract of guarantee cannot be understood or construed without showing by oral testimony the intention of the parties and the circumstances under which the guaranty was made.

While it is true that a written contract of guaranty cannot ordinarily be varied, contradicted or modified by parol evidence, courts will always seek to discover and give effect to the intention of the parties in carrying out or enforcing any contract, and will endeavor to place themselves in the position of the contracting parties so that they may understand the language employed, and the sense in which it was used by them in their

entry to such currency on his person, whereas Wilson gave him a check and later deposited the same in his personal account.

It appears from the report that the bill of particulars furnished by plaintiff showed in detail the names of the names -
furnish and the amount of their respective bills, the total
particulars which had been delivered to Liberty's, Inc., and the
total of \$8,000 paid on account.

The defendant takes the position that plaintiff had

represented himself to be engaged in the jewelry business and

received as full consideration of Liberty's, Inc., that he did not

know that plaintiff was a person who was selling jewelry on a basis

representative and that, based upon those representations he

signed the contract in question, which he contends is clear and

not subject to rescission under the contract and that plaintiff

by representing himself to be a person who was selling jewelry on a basis

for Liberty's, Inc., defendant's obligation becomes the same as if

plaintiff had actually been a person who was selling jewelry on a basis

the guarantee, and holds that such evidence was inadmissible on

issue as to the written contract between the parties.

Plaintiff, on the other hand, contends that the meaning

of the contract of guarantee cannot be ascertained by reference

to the contract by oral testimony the intention of the parties and

the circumstances under which the contract was made.

While it is true that a written contract of guarantee

cannot be rescinded or varied, established as matter of law

evidence, courts will always seek to discover and give effect to

the intention of the parties in carrying out an intention any

contract, and will endeavor to place themselves in the position

of the contracting parties to find out what was intended and to

ascertain, and the sense in which it was used by them in their

written undertaking. It was so held in the recent case of Yager v. Robinson Nash Motor Co., 340 Ill. 81, where the court said: (p. 91)

"* * * In the construction of contracts for the purpose of ascertaining the intention of the parties the court will endeavor, by extrinsic evidence of such facts as the parties had in view, to place itself as nearly as possible in their position, so that it may understand the language used in the sense intended by them. * * * In seeking to ascertain the intention, regard will also be had to the practical construction, if any, which the parties by their acts have given the contract. * * * So, also, the acts of the parties themselves indicative of their construction placed upon it may be resorted to for the purpose of determining the true meaning of the written agreement, and in this regard it makes no difference whether such acts are contemporaneous or subsequent. Moreover, where the contract is, in fact, understood by one of the parties in a certain sense and the other party knows that he so understands it then the undertaking is to be taken in that sense, provided this can be done without making a new contract for the parties."

In view of defendant's contention that plaintiff represented himself to be a jobber rather than the sales representative of various manufacturers, and plaintiff's denial thereof, it became important to determine the understanding of the parties with reference to the written instrument, which is not entirely clear upon its face. From a careful examination of the record, we are convinced that the court properly found that defendant's guaranty was intended to indemnify plaintiff for his personal liability incurred in purchasing merchandise from New York manufacturers on account of Libbye's, Inc. Inasmuch as plaintiff had never been in the jobbing or manufacturing business, as he testified without contradiction, the guaranty could not have been intended to cover merchandise sold or shipped by him to Libbye's, Inc., but was evidently given to indemnify plaintiff for purchases from manufacturers as sales representative for Libbye's, Inc. The testimony and correspondence between the parties amply supports this conclusion.

When Libbye's, Inc., account became delinquent, plaintiff wrote several letters to defendant requesting payment. None of these letters was answered, and defendant denied having received some

It was no help in the search for a man

U.S. DEPARTMENT OF JUSTICE

(12.4)

[illegible]

It is in view of defendant's contention that plaintiff's representative is himself to be a lobbyist rather than the other representative of various manufacturers, and plaintiff's denial thereof, it becomes important to determine the understanding of the parties with reference to the written instrument, which is not entirely clear upon its face. From a careful examination of the record, we are convinced that the court should find that defendant's position was intended to be that plaintiff for his business should be considered as representing the various manufacturers as against the lobbyist, and that as plaintiff had never been in the lobby in connection with the sale of the defendant's goods, the defendant's position was intended to be that plaintiff should be considered as representing the lobbyist as against the various manufacturers. The fact that plaintiff had never been in the lobby in connection with the sale of the defendant's goods, and that the defendant's position was intended to be that plaintiff should be considered as representing the lobbyist as against the various manufacturers, is a fact which the court should take into consideration in determining the issue. The testimony and correspondence between the parties clearly shows that the defendant's position was intended to be that plaintiff should be considered as representing the lobbyist as against the various manufacturers, and that the plaintiff's position was intended to be that plaintiff should be considered as representing the various manufacturers as against the lobbyist. The court should find in favor of the defendant.

of them. Plaintiff, however, testified he had written the letters, stamped and posted them, and it thereupon became a question of fact for the court to determine whether they were received. If the court believed they were it was proper to admit them in evidence, their relevancy being unquestioned.

Defendant insists that plaintiff failed to offer proof of the delivery of the merchandise to Libbye's, Inc., and that in the face of the denial of such delivery, and regardless of any other point raised, plaintiff cannot recover. We find, however, that the court admitted in evidence an exhibit consisting of 21 checks drawn on the Chase National Bank of New York, made payable to the various manufacturers from whom plaintiff purchased merchandise for Libbye's, Inc., and attached to each check is a copy of a statement showing the name of the manufacturer, the amount of the purchase, and a notation showing that the merchandise was shipped to Libbye's, Inc. In view of the various letters in evidence making demand for payment, and the failure of defendant to introduce any proof to rebut the shipment of merchandise, we believe this was sufficient proof under the declaration to support the judgment.

The record discloses that Libbye's, Inc., which had operated under another name prior to its incorporation, could not procure credit from manufacturers. This guaranty was made by defendant in order to enable them to procure merchandise without paying cash therefor. The only witnesses testifying upon the hearing were the plaintiff and defendant, and the testimony relative to their conversations and negotiations presented a conflict of evidence which it was incumbent upon the court to determine. Under all the circumstances it seems reasonable to suppose that, considering the character of plaintiff's business as a sales representative, it could not have been intended by the written guarantee that defendant would indemnify him only for goods shipped by him to Libbye's, Inc.; he was not in

of them. Plaintiff, however, testified he had written the letters, assigned and posted them, and it therefore became a question of fact for the court to determine whether they were received. If the court believed they were it was proper to admit them in evidence. But plaintiff being unsuccessful.

Plaintiff insists that defendant failed to offer proof of the delivery of the merchandise to Lipky's, Inc., and that in the face of the finding of such delivery, and receipt by Lipky's, Inc., defendant's complaint should be dismissed. In fact, the court admitted in evidence an exhibit consisting of 22 checks drawn on the Chase National Bank of New York, made payable to the various manufacturers from whom plaintiff purchased merchandise for Lipky's, Inc., and attached to each check is a copy of a statement showing the name of the manufacturer, the amount of the purchase, and a notation showing that the merchandise was shipped to Lipky's, Inc. In view of the various letters in evidence making demand for payment, and the failure of defendant to introduce any proof to rebut the shipment of merchandise, we believe this was sufficient proof under the circumstances to support the judgment.

The court directed that Lipky's, Inc., which had appeared under another name prior to the incorporation, could not produce evidence from its records to show that it had paid for the merchandise. The only evidence tending to show that Lipky's, Inc. had paid for the merchandise, and the testimony relative to their own transactions and obligations presented a conflict of evidence which it was incumbent upon the court to determine. Under all the circumstances it seems reasonable to suppose that, considering the character of plaintiff's business as a sales representative, it could not have been informed by the various factories that shipment would be made to Lipky's, Inc., but that he was not in

the business either of jobbing or manufacturing goods, and had none of his own to ship. Defendant is a lawyer and evidently understood the nature of plaintiff's business when the guarantee was made and the purpose for which the guarantee was given.

For the reasons stated, we are of the opinion that the court properly found for plaintiff, and the judgment will accordingly be affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

the business either of buying or manufacturing goods, and not
 more of his own to ship. Defendant is a lawyer and not a
 manufacturer. The nature of plaintiff's business when the contract
 was made and the purpose for which the payment was given.
 For the reasons stated, we are of the opinion that the
 court properly found for plaintiff, and the judgment will

be affirmed.

ATTORNEYS

London and Sullivan, U.S. Circuit

37619

FRANK STEININGER,
Appellee,

v.

BEATRICE CREAMERY COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 632²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted a tort action against defendant in the Municipal court of Chicago for damages to his truck resulting from a collision with defendant's truck at the intersection of Grant and Cleveland avenues, in the city of Brookfield, Illinois, August 8, 1933. Trial was had before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of \$299.75.

Defendant's sole contention is that plaintiff was guilty of such contributory negligence as to bar a recovery. The material facts disclose that on the day in question, at 2:30 in the afternoon, defendant's truck was proceeding in a southerly direction along Cleveland avenue in Brookfield, Illinois. The weather was fair and the pavement dry. Both streets are about 22 feet in width and of concrete construction. As the driver reached the intersection of Grant avenue he made a short left turn to the east, within 3 or 4 feet of the northeast curb, and struck plaintiff's truck, which was being driven in a westerly direction on Grant avenue. Both drivers testified that they were going at the rate of about 15 or 20 miles an hour, although there is evidence of greater speed on the part of plaintiff. After defendant's truck had made the left turn,

STATE OF ILLINOIS
COUNTY OF COOK

BEFORE ME, the undersigned authority,
on this day personally appeared _____
known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

2791 A. 633

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 19____.

Notary Public in and for the State of Illinois

IN the Municipal Court of Chicago for damages to his truck resulting from a collision with defendant's truck at the intersection of Grand and Cleveland avenues, in the city of Brookfield, Illinois, against B. J. JONES. Trial was had before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of \$100.00.

100-10000

Defendant's wife contention is that plaintiff was negligent at such contributory negligence as to bar a recovery. The material facts disclosed that on the day in question, at 2:00 in the afternoon, defendant's truck was proceeding in a westerly direction along Cleveland avenue in Brookfield, Illinois. The weather was fair and the pavement dry. Both trucks are about 25 feet in width and at certain consideration, as the driver reached the intersection of Grand avenue he made a sharp left turn to the east, within 5 or 6 feet of the defendant's truck, and struck plaintiff's truck, which was being driven in a westerly direction on Grand avenue. Both drivers testified that they were going at the rate of about 15 or 20 miles an hour, although there is evidence of greater speed on the part of plaintiff. These defendant's truck had made the left turn,

plaintiff, evidently seeking to avert the impact, swerved his truck to the left and his vehicle was struck on the right side and forced against the southeast curb, coming to rest facing southwest.

The gravamen of defendant's charge as to plaintiff's contributory negligence is two-fold: (1) That the two trucks, having approached the intersection at about the same time, as defendant contends, it had the right of way under section 33, chapter 95a, Motor Vehicle Law, Cahill's 1933 Revised Statutes, and was justified in assuming that plaintiff's truck would slow down and yield the right of way to defendant, and, having failed so to do, it was plaintiff's negligence that caused the accident, and (2) that plaintiff's slight turn to the left across the center line of Grant avenue just before the collision, in an effort to avoid defendant's truck, indicates such negligence on his part as to bar a recovery. These two charges of negligence are urged as grounds for the contention that the court should have directed a verdict in favor of defendant.

As to the first of these contentions, it appears that at no time during the trial of the case did defendant raise the question of the right of way. It evidently proceeded on the theory that the collision occurred at a point approximately 12 feet east of the curb line of Cleveland avenue and after defendant's driver had completed his left turn, for on this phase of the case George W. Peck, the driver of defendant's truck, testified as follows:

"Q. How far into Grant avenue had you proceeded after you said you made that turn?

A. 12 feet.

Q. Where was the truck westbound on Grant avenue when you got to the point designated, - 12 feet east of Cleveland avenue?

A. About the alley, - 100 or 125 feet.

Q. 125 feet from what?

A. From the corner.

Q. Of Cleveland to the alley?

A. From Cleveland to the alley."

plaintiff, evidently seeking to avoid the impact, swerved his truck to the left and his vehicle was struck on the right side and forced against the southeast curb, coming to rest facing defendant.

The Government of defendant's charges as to plaintiff's contributory negligence is two-fold: (1) That the two vehicles, having approached the intersection at about the same time, as defendant contends, it was the right of way under section 23, chapter 23C, Motor Vehicle Law, C.M.R.'s 1933 Revised Statutes, and was justified in assuming this plaintiff's truck would slow down and yield the right of way to defendant, and, having failed to do so, it was plaintiff's negligence that caused the accident, and (2) that plaintiff's right turn to the left across the center line of Grant Avenue just before the collision, in an effort to avoid defendant's truck, indicates such negligence on his part as to bar a recovery. These two charges of negligence are urged as grounds for the contention that the case should have decided in favor of defendant.

As to the first of these contentions, it appears that at no time during the trial of the case did defendant raise the question of the right of way. It is extremely prejudicial on the theory that the collision occurred at a point approximately 12 feet west of the curb line of Cleveland Avenue and after defendant's driver had completed his left turn, for on this phase of the case George T. Beck, the

- driver of defendant's truck, testified as follows:
1. That for some time before the collision he was proceeding west on Grant Avenue and had just passed the intersection of Grant Avenue and Cleveland Avenue.
 2. That he saw the plaintiff's truck approaching from the east on Cleveland Avenue.
 3. That he saw the plaintiff's truck turn left across the center line of Grant Avenue.
 4. That he saw the plaintiff's truck strike the defendant's truck.
 5. That he saw the plaintiff's truck strike the defendant's truck.
 6. That he saw the plaintiff's truck strike the defendant's truck.
 7. That he saw the plaintiff's truck strike the defendant's truck.
 8. That he saw the plaintiff's truck strike the defendant's truck.
 9. That he saw the plaintiff's truck strike the defendant's truck.
 10. That he saw the plaintiff's truck strike the defendant's truck.

No instruction was offered or given on the question of the right of way, and so far as we can find the record is silent on the subject. Under the circumstances, defendant cannot be heard to raise the question for the first time and shift its position in the court of review. (Northern Trust Co. v. Chicago Railways Co., 232 Ill. App. 246, 257.)

Defendant's second ground for asserting that plaintiff's negligence was the contributing cause of the accident is that plaintiff turned slightly to the left across the center line of Grant avenue just before the impact, indicating an omission of due care for his own safety. The evidence shows that defendant's driver made a short left turn into Grant avenue, within 3 or 4 feet of the northeast curb. Plaintiff was proceeding west on the right hand side of the street, which was only 22 feet in width. Obviously, he could not keep to the right and pass between the curb and the rear of defendant's truck; so in an effort to avoid the truck he turned to the left. He was an experienced driver, and did what he thought was necessary to avoid the accident when placed in a sudden position of danger. We cannot censure in defendant's contention that this constituted negligence. The law does not exact the same measure of prudence from a person compelled to act in a sudden emergency as it does where there is time for deliberation. (Barnes v. Danville Street Railway Co., 235 Ill. 566, 570-71.)

Finally, the question of contributory negligence is generally one of fact for the jury, and becomes a question of law only when the facts so clearly fail to establish due care that all reasonable minds would reach such a conclusion. If the evidence on the question is in conflict, or if there is evidence fairly tending to support the verdict, the question must be submitted to the jury. (Chicago & Eastern Illinois R. R. Co. v. Cross, 214 Ill.

602.)

We believe the trial court properly denied defendant's motion for a directed verdict, and the judgment will be affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

[100]

It follows the fact that the amount of the money which has been received for a certain service, and the amount which has been paid for it, is the same.

There is no doubt that the amount of the money which has been received for a certain service, and the amount which has been paid for it, is the same.

37645

BESSIE COHEN,
Appellee,

v.

MEYER PIKOWSKI and
BERTHA PICK,
Appellants.

887
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 632³

MR. PRESIDING JUSTICE FAIRBANK DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a tort action of the 4th class in the Municipal court of Chicago against defendants to recover damages for personal injuries sustained by her in an automobile collision, while riding as a guest of defendants. Trial was had before the court without a jury, and a finding and judgment in plaintiff's favor for \$1,000 against both defendants.

It is conceded by the pleadings, consisting of an amended statement of claim and affidavit of merits, that plaintiff was invited to ride as a passenger in the automobile owned by Bertha Pick, one of the defendants, and driven by Meyer Pikowski, the other defendant, as her agent. No question is raised as to the injuries sustained by plaintiff or the amount of damages recovered.

Under section 42 of Chapter 95a (Cahill's 1933 Revised Statutes) of the act entitled "Motor Vehicles," (as amended in 1931) plaintiff's recovery as a guest passenger is contingent upon proof that the accident was caused by the wilful and wanton misconduct of the driver, the owner of the car or her employes or agent, and that such misconduct contributed to the injury for which action is brought. Accordingly, the principal question

presented for review is, whether the collision resulted from the wilful and wanton misconduct of defendants as charged in the amended statement of claim.

The accident occurred shortly after 11:00 o'clock on the evening of November 26, 1933. Defendants' Chrysler car, containing eight passengers, was being driven in a southerly direction on Kimball avenue. Pikowski was driving. Seated with him, in front, were Bertha Pick and Dr. Guttman. Plaintiff, her husband, their minor child, and two others were seated in the rear. Near the intersection of Leland avenue, defendants' car collided with a Nash automobile operated by one Benjamin F. Coch, who was making a left turn from Kimball avenue into Leland avenue. Numerous witnesses, including the occupants of defendants' car, Mr. and Mrs. Coch, and Seymour Katz, Edward Miller and Boulah Tapper, three high school students walking along Kimball avenue in a southerly direction, testified to the events leading up to the collision. There is a sharp conflict of the evidence upon the essential facts constituting the charge of wilfulness and wantonness.

Plaintiff's witnesses stated that defendants' car was proceeding along Kimball avenue on the left, or wrong, side of the street, at a high rate of speed, varying from 40 to 45 miles an hour. Plaintiff testified that when they left the residence on Kimball avenue where they had all been visiting, located about a block and a half from the intersection of Leland avenue, Pikowski started out and was "going terrible fast, and it couldn't have been very far when I asked him to slow down," and that she also heard Dr. Guttman say to Pikowski, "You ought to slow down, because there is a baby in here," to which the latter (Pikowski) replied, "That is all right, we won't get killed."

presented for review in, whether the collision occurred from the
willful and wanton misconduct of defendant as charged in the
alleged statement of victim.
The accident occurred shortly after 11:00 P.M. on
the evening of November 22, 1935. Defendant, driver and
containing eight passengers, was being driven in a southerly
direction on Island Avenue. Witness was sitting beside
defendant at the time, with Edward Lee and Mr. William H. Hester,
her husband, their minor child, and two others who were seated in the
rear. Near the intersection of Island Avenue, defendant was
collided with a Buick automobile operated by one Benjamin F. Cook,
who was making a left turn from Island Avenue into Island Avenue.
Numerous witnesses, including the occupants of defendant's car,
Mr. and Mrs. Cook, and Raymond Hester, Edward Miller and Benjamin
Tupper, three high school students sitting along Island Avenue
in a southerly direction, testified to the events leading up to
the collision. There is a sharp conflict of the evidence upon
the essential facts constituting the charge of willfulness and
negligence.
Defendant's statement that her husband was
was proceeding along Island Avenue on the left, at about 45
of the speed, at a high rate of speed, varying from 40 to 45
miles an hour. Witness testified that when they left the
residence on Island Avenue where they had all been visiting,
travelled about a block and a half from the intersection of Island
Avenue, Edward started out and was "going south" and, and
it couldn't have been very far when I asked him to slow down,"
and that she also heard Mr. Hester say to Edward, "Tom ought
to slow down; because there is a baby in here," to which she
Edward (Tupper) replied, "That is all right; we won't get
killed."

Benjamin F. Cech testified that he was proceeding north on the right hand, or east, side of Kimball avenue, at the rate of about ten miles an hour, and slowed down almost to a stop at the intersection of Leland avenue, preparatory to making a left turn, when he observed defendants' car, coming from the north, on the left hand side of the street, at a great rate of speed, and "all at once he came over to the right and back to the left and practically the first thing I knew he ran into me. I was dragged south 10 feet and was still at the intersection of Leland avenue and Kimball when my car came to a rest. The other car skidded away over to the street * * * and he was over the curb - west of the curb - the right hand side, and facing straight south."

Mrs. Cech, who sat beside her husband in the front seat, stated that their car was still on the left hand side of Kimball avenue when the collision occurred; that considerable traffic was passing in both directions, north and south, and that defendants' car was "going so fast that the tires had burned a mark in the street, the police could see that themselves."

Two police officers arrived at the scene of the accident shortly after it occurred, and by means of a flashlight inspected the pavement, the positions of the two cars, and made certain findings and observations, to which they testified. Officer Anthony J. Conte stated that Kimball avenue is about 50 feet wide at the intersection of Leland avenue and that the latter street is about 40 feet in width; that defendants' car was about a foot from the west curb, and that he found two tire marks about 15 feet long "burned in the pavement, the kind of marks that you usually find on the pavement by applying brakes suddenly" leading up to the wheels of defendants' car. He further stated that there were no other skid marks indicating a car coming from any other direction, and that from his observations it appeared that Cech's car came

Benjamin W. Cook testified that he was proceeding north on the right hand, or east, side of Kimball Avenue, at the time of about ten miles an hour, and slowed down almost to a stop at the intersection of Island Avenue, preparatory to making a left turn, when he observed defendant's car, coming from the north, on the left hand side of the street, at a great rate of speed, and "all at once he came over to the right and back to the left and practically the first thing I knew he ran into me. I was driving south on foot and was still at the intersection of Island Avenue and Kimball when my car came to a stop. The other car skidded away over to the street and he was over the curb a good bit the car - the right hand side, and facing straight north."

That Cook, who said he is the husband in the front seat, stated that their car was still on the left hand side of Kimball Avenue when the collision occurred; that immediately after the passing in both directions, north and south, and that defendant's car was "going so fast that the tires had burned a mark in the street, the police could see that themselves."

Two police officers arrived at the scene of the accident almost after it occurred, and by means of a flashlight investigated the pavement, the positions of the two cars, and made certain findings and observations, at which they testified. Officer Nathan Le Conte stated that Kimball Avenue is about 30 feet wide at the intersection of Island Avenue and that the latter street is about 40 feet in width; that defendant's car was about a foot from the curb when it struck, and that he found two tire marks about 15 feet long "burned in the pavement, the kind of marks that you usually find on the pavement by applying brakes suddenly." Looking up to the wheels of defendant's car, he further stated that there were no other tire marks indicating a car coming from any other direction, and that from his observations it appeared that Cook's car came

to a stop exactly where it was struck, thus tending to corroborate Coch's version of the events leading up to the collision. The other officer, Edward Schumacher, testified that he observed what appeared to be skid marks on the pavement as a result of the application of brakes, freshly made, and leading to the rear of defendants' car and about 20 feet in length; that defendants' car was over the sidewalk in the school grounds.

Three high school students, Seymour Katz, Edward Miller and Beulah Tapper, walking in a southerly direction along Kimball avenue, testified that they observed defendants' car as it passed them proceeding at a rate of speed varying from 40 to 50 miles an hour. Seymour Katz stated that defendants' car was proceeding partly to the left side of the street, and seemed to veer to the right just before the impact. Beulah Tapper likewise stated that defendants' car "was going on the wrong side of the street in the neighborhood of 40 to 50 miles an hour."

Defendants and some of the occupants in their car denied the conversations between plaintiff and Dr. Guttman with Fikowski, asking him to slow down, and his response thereto, denied that defendants' car was proceeding on the left, or east, side of Kimball avenue, and estimated the speed of said car at a rate varying from 25 to 35 miles an hour.

Under this state of the evidence it was for the court who saw the witnesses, heard them testify and had the opportunity to observe their demeanor while testifying, to determine whether defendants were guilty of wilful and wanton misconduct in driving the car, and we do not feel justified in disturbing the court's finding as being contrary to the manifest weight of the evidence.

We have carefully examined the other questions raised by defendant's brief, relating to the manner in which the court

to a stop exactly above it and witness, then looking to the right
such a position of the witness looking up to the collision. The
witness, however, testified that he observed the
apparent to be with marks on the pavement as a result of the
application of brakes, thereby made, and looking to the rear of
defendants' car and about 20 feet in length, that defendant's car
was over the sidewalk to the school grounds.
That high school witness, however, stated that
and further stated, walking in a southerly direction along sidewalk
evidence, testified that they observed defendants' car as it passed
them proceeding at a rate of speed varying from 20 to 30 miles an
hour. Witness also stated that defendants' car was proceeding
partly to the left side of the street, and seemed to turn to the
right just before the impact. Further, witness testified that
defendants' car was going on the wrong side of the street in the
neighborhood of 20 to 30 miles an hour.
Defendants and some of the witnesses in front car stated
the conversation between witness and the witness with respect to
calling him to stop again, and his response thereto, that the
defendants' car was proceeding on the left, or back, side of
sidewalk, and followed the speed of said car at a rate
varying from 20 to 30 miles an hour.
That this state of the witness is not the case
the way the witness, heard them testify and had the opportunity
to observe their conduct with respect to the testimony given
defendants were going at a high and unsafe speed in driving
the car, and he was not truly justified in attributing the car's
finding as being contrary to the admitted weight of the evidence.
We have carefully examined the other questions raised
by defendant's brief, relating to the manner in which the jury

conducted the trial and the alleged defects in plaintiff's amended statement of claim, but find no convincing reasons to reverse, and the judgment is therefore affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

37658

897

JOSEPH J. FELLER,
Appellee,

v.

STERLING CASUALTY INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 632⁴

MR. PRESIDING JUSTICE WHIARD DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of the 4th class in the Municipal court seeking to recover for injuries under an accident and sickness policy issued to him by defendant. The cause was tried before the court without a jury, resulting in a finding of the issues for plaintiff, whose damages were assessed at \$600. This appeal follows:

It appears from the evidence that June 8, 1932, Sam Hurwitz, an agent of defendant, visited plaintiff at his place of business and procured from him a written application for an accident and sickness policy in defendant company. On the bottom of this policy there appears an initialed pencil notation, showing that the policy was approved by defendant June 8, 1932. Plaintiff testified that Hurwitz came to see him two days later, July 11, and said "the policy is all ready, give me a check for \$10.95, and the policy will be mailed to you." Plaintiff thereupon gave Hurwitz a check for \$10.95, payable to defendant, and received therefor the following receipt:

"Date 6/11/32o

Received of J. Feller the sum of Ten Dollars Ninety-five Cents (\$10.95) being full first year's payment on a Sterling 3-Penny-a-Day Accident and Sickness Policy to be issued by the above Company, Policy to be in force as soon as this payment and the application have been received and accepted by the Company and policy issued while the applicant is alive

and in good health and free from injury.

Sterling Casualty Insurance Co.

By Sam Hurwitz

Special Sales Representative.

Representative's

Complete Address. 1859 S. Hamlin

Make All Checks Payable to Sterling Casualty
Insurance Co.

If your policy is not received within 10 days from date of this receipt, kindly send this receipt to the company for immediate attention."

Plaintiff sustained an accidental injury on June 14, 1932.

June 17, 1932, he received the policy from defendant by mail, to which there was attached a photostatic copy of his application for insurance, and a second receipt for \$10.95, dated June 15, 1932.

Plaintiff testified that about three days after his injury he inquired of defendant company what else he would have to do, to which defendant replied in writing, June 27, 1932, as follows:

"It is imperative that you forward to us the original agent's receipt, not the company's typewritten receipt, inasmuch as it is necessary that we have this receipt to really determine whether you paid the premium prior to the time that our agent turned in the money to our company, in order to put your policy in force."

The communication was accompanied by blanks for filing proof of loss, which plaintiff filled out and returned to defendant.

Later plaintiff received another letter from defendant, dated October 13, 1932, which is partly as follows:

"We acknowledge your telephone conversation with our office and in furtherance of this matter wish to advise that under date of June 27th our file indicates that we wrote you requesting that you furnish us with the original paid receipt which our agent gave you at the time that he collected your money for the policy which you have with this company.

"It is necessary that we have this original agent's receipt in order to satisfy certain contentions as to when your policy was in full force and effect and without this receipt we, of course, are in no position to honor any claim."

Subsequently defendant denied liability, but did not cancel the policy, return the premium which plaintiff had paid, nor offer to return the same.

By way of defense defendant offered in evidence the original application for insurance and the receipt, dated June 15, 1932, which was enclosed with the policy of insurance mailed to plaintiff.

and in good health and then later
residing at 1000 10th Avenue N.E.
City of Seattle
Special Agent in Charge

Respectfully,
Sincerely,
JAMES M. HAMILIN
Special Agent in Charge

It is noted that you received a letter from the
Insurance Co. dated 10/10/33, which was
received by the company on 10/10/33.

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The letter was received by the company on 10/10/33.

Plaintiff offered evidence tending to show that he was totally disabled for a period of more than twelve months, and that by the terms of the policy he became entitled to the sum of \$30 for each month of his disability, aggregating \$600.

The principal question for determination is whether the policy became effective prior to or subsequent to the date of the accident. The policy bears no date, but states that it insures plaintiff "for a term of One Year from noon, Standard Time, of date shown on official receipt." There being two receipts in evidence, one given plaintiff by Hurwitz, defendant's agent, June 11, 1932, when the premium was paid, and the other, dated June 12, 1932, which was transmitted with the policy mailed to plaintiff, neither of which is designated as an "official receipt," it becomes important in the first instance to determine which receipt is official, and the legal import thereof.

From the tenor of defendant's letter of June 27, 1932, it would seem that defendant evidently attached considerable importance to the receipt of June 11, 1932, for it wrote "it is imperative that you forward to us the original agent's receipt, not the Company's typewritten receipt, inasmuch as it is necessary that we have this receipt to really determine whether you paid the premium prior to the time that our agent turned in the money to our company, in order to put your policy in force," and almost four months later, October 18, 1932, defendant still emphasized the necessity of having this receipt, when it stated that "it is necessary that we have this original agent's receipt, in order to satisfy certain contentions as to when your policy was in full force and effect." The only logical conclusion to be drawn from these two communications is that for several months following the accident defendant itself considered the policy effective as of the date when plaintiff paid the premium and received the "original agent's receipt." To support this conclusion we find plaintiff's statement that when he gave Hurwitz his check June 11, the latter said "the

plaintiff offered evidence tending to show that he was
regularly attended for a period of more than twelve months, and that
of the terms of the policy he became entitled to the sum of \$10,000
and benefit of his disability, aggregating \$1000.
The principal question for determination is whether the
policy became effective prior to or subsequent to the date of the
accident. The policy bears no date, but states that it in-
sures "for a term of One Year from noon, January 1st, 1915,
shown on official receipt." There being two receipts in evidence,
one given plaintiff by himself, defendant's agent, June 11, 1915,
then the directors are paid, and the other June 11, 1915, which
was transmitted with the policy mailed to plaintiff, neither of which
is designated as an "official receipt," it becomes important in the
first instance to determine which receipt is official, and the latter
important thereby.
From the facts of defendant's agent's letter of June 17, 1915, it
will soon be apparent plaintiff offered plaintiff's statement
as the receipt of June 11, 1915, for it reads "it is respectfully
you forward to us the original receipt, and the company's
typewritten receipt, inasmuch as it is necessary that we have this
receipt in order to make payment to you, and the company's
the fact that your policy is not ready to be issued, it being
not your policy to issue," and signed "your mother's agent, Robert H.
1915. Defendant will maintain the receipt of June 11, 1915,
and is stated that "it is necessary that we have this original receipt
ready, in order to make certain contention as to when your policy
was in full force and effect." The only logical conclusion to be drawn
from these two communications is that the typewritten receipt, being the
original document itself, constituted the policy effective as at the
date when defendant paid the premium and received the "original receipt".
To support this conclusion we find plaintiff's statement
that when he gave himself the check June 11, the latter said "the

policy is all ready, give me a check for \$10.95, and the policy will be mailed to you."

By the terms of defendant's receipt of June 11 the policy was to become effective when (1) payment was made; (2) the application was received and accepted; and (3) the policy was issued. Payment on June 11 is not disputed, and from defendant's own exhibit it appears that the application was received and approved by defendant June 9. The policy bears no date, and there is no evidence to show when it was issued, nor when Hurwitz, its agent, turned the premium payment over to the company. Defendant takes the position that the second receipt, dated June 15, fixes the date on which defendant received the premium payment from its agent and when the policy issued, but no proof was adduced to support this contention and we regard it as being out of harmony with the circumstances of the case.

Several pages of defendant's brief are devoted to the proposition that the application and policy constitute a written contract, which is clear, concise and unambiguous, and therefore cannot be varied by parol evidence. Plaintiff concedes this proposition to be sound, but points out that he does not base his claim upon any oral agreement or oral statement made by defendant's agent, nor does he seek to vary the terms of the agent's receipt, the application for insurance or the policy itself, and we believe his position in this behalf is sound and fully sustained by the record and his counsel's brief. Plaintiff's testimony relating his conversation with Hurwitz when the premium check was paid was not offered for the purpose of varying the terms of the contract but to support plaintiff's contention that the application had been approved by defendant, that the policy was "all ready," and that as soon as plaintiff had paid his premium the policy would be mailed.

The only other question presented by counsels' briefs

policy is all ready, give me a check for \$10,000, and the policy will be mailed to you."

By the terms of defendant's reading of June 11 the

policy was to become effective when (1) payment was made; (2) the

application was received and accepted; and (3) the policy was issued.

Payment on June 11 is not disputed, and from defendant's own admission

it appears that the application was received and approved by defendant

and June 9. The policy bears no date, and there is no evidence as to

when it was issued, nor when defendant, the agent, received the

premium payment over to the company. Defendant claims the policy was

sent the second week of June 12, after the date on which

defendant received the premium payment from his agent and when the

policy issued, but no proof was adduced to support this contention

and we regard it as being out of harmony with the circumstances of

the case.

Several pages of defendant's brief are devoted to the

proposition that the application and policy constitute a written contract,

which is clear, certain and unambiguous, and therefore cannot

be varied by parol evidence. Plaintiff denies this proposition in

his answer, but claims that he does not dare file upon any oral

agreement or oral statement made by defendant's agent, nor does he seek

to vary the terms of the agent's receipt, the application for insurance

and the policy itself, and we believe his position in this behalf

is sound and fully sustained by the record and his own admission.

Plaintiff's testimony relating his conversation with defendant from the

time the check was paid was not offered for the purpose of varying the

terms of the contract but to suggest plaintiff's contention that the

application had been accepted by defendant, that the policy was "all

ready," and that as soon as plaintiff had paid his premium the

policy would be mailed.

The only other question presented by counsel's briefs

relates to the motion of plaintiff to strike the record and dismiss the appeal for want of jurisdiction. This motion was reserved to the hearing. In view of the conclusion reached as to the merits of this cause, however, the motion will be denied.

There being no reversible error in the record, the judgment of the Municipal court will be affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

37711

CHARLES W. ASH,
Appellant,

v.

THEO.B. ROBERTSON PRODUCTS
CO., a corporation, THEO.B.
ROBERTSON, HARRIET CHALLENGER,
GEORGE A. LANTHES, LAWRENCE E.
MOYER and RALPH FERGUSON,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

279 I.A. 633¹

MR. PRESIDING JUSTICE FAIRBANKS DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill in the superior court against Theo. B. Robertson Products Co., (hereinafter referred to as the corporation), Theo. B. Robertson, Harriet Challenger, George A. Lanthès, Lawrence E. Moyer and Ralph Ferguson, charging defendants with unfair competition, and praying for an injunction, an accounting and damages.

Defendants having filed their joint and several answers, denying the wrongful acts alleged, a general reference was had to a master. While the cause was pending before the master, defendants filed an amendment to their answers averring that complainant had come into court with unclean hands by reason of inequitable conduct practiced subsequently to the filing of the bill of complaint.

After extended hearings the master made his report. Exceptions thereto were filed by all parties. The chancellor overruled complainant's exceptions, sustained those of defendants, and entered a decree denying complainant the injunction sought and damages, finding the equities to be with the individual defendants, and ordering a rereference to the master for the sole and only purpose of stating an account between complainant and the cor-

poration for a limited period. Complainant appealed from the decree, and the corporation filed a cross appeal from that part of the decree directing a rereference for the purpose of an accounting.

It appears from the record that the corporation was organized in 1901, and continuously since then has been engaged in the manufacture and sale of soap powders, dishwashing powders, brushes and various other articles approximating 50 in number, to restaurants and other industrial concerns throughout the United States.

In 1927 complainant represented himself to be the owner of a formula for a dishwashing powder, and approached the corporation with a view to entering into an arrangement under which the corporation would manufacture this powder according to complainant's formula, sell it and pay royalties on all sales made. The negotiations culminated in a written contract, dated March 12, 1928, which provided among other things that the product manufactured and sold under complainant's formula be designated "Daddy Ash's Cleaner." It further appears from the evidence that the corporation had been selling dishwashing powders under the name "Robertson's Washing Powders," and "20th Century Soda," since 1915, and that complainant had never sold a dishwashing powder manufactured under his formula under the name of "Daddy Ash's Cleaner" prior to the execution of the contract in question. Pursuant to the agreement, the corporation manufactured and sold a dishwashing powder, using complainant's formula, under the stipulated name, "Daddy Ash's Cleaner," until February 1, 1930, when complainant notified the corporation that he desired to terminate the contract under a 60-day termination clause contained in the agreement.

During the contractual relationship of the parties extending over a period of about two years, Daddy Ash's Cleaner was sold

...for a limited period. Complaints against the ...
...and the corporation filed a motion against the ...
...of the board directing a reorganization for the purpose of an
...accounting.

It appears from the record that the corporation was
organized in 1904, and continuously since then has been engaged
in the manufacture and sale of soap powders, dishwashing powders,
brushes and various other articles representing its business.
In 1904 and other industrial concerns throughout the
United States.

In 1907 complaints represented themselves to be the owner of
a formula for a dishwashing powder, and approached the corporation
with a view to entering into an arrangement under which the corpora-
tion would manufacture this powder according to complainant's
formula, sell it and pay royalties on all sales made. The negoti-
ations culminated in a written contract, dated March 22, 1908, which
provided among other things that the product manufactured and sold
under complainant's formula be designated "Baby Soap's Dishwasher". It
further appears from the evidence that the corporation had been selling
dishwashing powders under the name "Baby Soap's Washing Powder", and
"Baby Soap's Dishwasher", since 1904, and that complainant had never sold
a dishwashing powder manufactured under his formula before the date
of "Baby Soap's Dishwasher" prior to the execution of the contract in
question. Pursuant to the agreement, the corporation manufactured
and sold a dishwashing powder, being complainant's formula, under the
designated name "Baby Soap's Dishwasher", until February 1, 1910.

When complainant notified the corporation that he desired to terminate
the contract under which he had been manufacturing the product in the above-
mentioned manner, the corporation refused to do so, and continued to
manufacture and sell the product under the name "Baby Soap's Dishwasher" until
the present time.

as one of the 50 odd items manufactured by the corporation. Complainant acted as salesman, along with the defendants, Lanthier, Moyer and Ferguson, selling not only Daddy Ash's Cleaner but also the other manufactured products. No separate books were kept for Daddy Ash's Cleaner, but sales thereof were entered in the corporation's books without in any way being distinguished from other sales, and bills were rendered in the same manner as bills for other items, and collections made by the corporation. All of these practices were consented to and acquiesced in by complainant, who received from the corporation commissions and other payments to which he was entitled under the contract while it was in effect. The decree specifically so finds, and the record shows that complainant was overdrawn to the extent of \$165.74 at the time he severed his connection with the corporation.

Immediately after the termination of the agreement in February, 1930, complainant entered into a similar arrangement with Riversey Mfg. Company to manufacture and sell Daddy Ash's Cleaner, and mailed and printed announcements advising the trade of that fact.

Shortly after the termination of Ash's contract, the corporation advised its salesmen that it was putting out a new improved dishwashing powder, in accordance with a new formula conceived by its chemist, to be sold under the trade name, "R.P.C.," derived from the name of the corporation, Robertson Products Co.

On September 19, 1929, while the contract between complainant and the corporation was in effect, Ash executed a bill of sale to the American Coffee Company for a valuable consideration, selling and delivering to it the formula for Daddy Ash's Cleaner, together with the privileges and benefits incidental thereto.

Subsequently, January 2, 1930, the American Coffee Company sold and transferred all its right, title and interest in and to said bill of sale, and the formula therein described, to one J. M. Criticos,

as one of the 50 odd items mentioned by the respondents. These
 items, listed as follows, along with the following, however,
 paper and documents, which was sent under the name of the
 the other mentioned persons. No separate books were kept for
 only the names, but when listed were entered in the copy-
 alist's book without in any way being distinguished from other sales
 and bills were entered in the same manner as with the other items,
 and collected into by the corporation. All of these documents
 were accounted for and included in by respondents, who received
 from the corporation commissions and other payments in which he was
 entitled under the contract which is set forth. The above
 description of these, and the other items listed, and
 everything to the extent of which he the time he covered his account-
 and with the corporation.

Immediately after the formation of the corporation in
 January, 1911, respondents entered into a similar agreement with
 Henry H. Company to purchase and sell under the name of the
 and which the respondents received the same as that of the
 which after the formation of the corporation, the two
 parties advised its business that it was making out a new inventory
 which was given, in accordance with a new formula submitted by
 its board, to be sold under the name of "H. H. Company" from
 the date of the corporation, January 1911, to the date of the
 to January 1912, when the contract between respondents
 and the corporation was in effect, and entered a bill of sale to
 the United States Company for a certain quantity, which was
 submitted to the board of the company, and the board, which with
 the division and profits distributed between

Accordingly, January 2, 1912, the American Cotton Company
 sold and transferred all its rights, title and interest in and to said
 bill of sale, and the certain therein described to the J. M. Division

who, April 15, 1930, in turn, sold, transferred and assigned to defendant corporation all his right, title and interest in and to said bill of sale and formula.

The gravamen of complainant's charge as shown by his bill, filed April 30, 1930, 15 days after the corporation had acquired title to the formula from Criticos, is that the corporation, wrongfully used complainant's formula for Daddy Ash's Cleaner in the manufacture and sale of its own (R.P.C.) dishwashing powder; that this constituted unfair competition, that the corporation and the individual defendants ought to be restrained from continuing the practice and be required to pay damages and account to complainant for all sales made. With respect to this contention, however, the chancellor found that by virtue of the bill of sale from complainant to American Coffee Company, and the several assignments thereof, the corporation had the right to manufacture a product under the formula for Daddy Ash's Cleaner, or D. A. C., and to sell such product to anyone whomsoever under the name R. P. C., or under any name other than Daddy Ash's Cleaner, or D. A. C., from and after April 15, 1930, the date on which it acquired the right, title and interest to the bill of sale and formula by assignment from Criticos, without any liability to account to complainant therefor.

The chancellor was evidently of the opinion, and found, that the corporation had acquired all right, title and interest in and to the use of complainant's formula by assignment of the bill of sale from Criticos April 15, 1930. If he were correct in that conclusion, it became unnecessary to determine from the evidence whether the formula used by the corporation after said date in the manufacture of R. P. C. was a new formula or the "Daddy Ash's Cleaner" formula, and it would logically follow that there could be no finding of unfair competition based on the alleged wrongful use of a formula to which the corporation had succeeded as owner. Neither would

the bill in 1930, in which case, the bill was passed in 1930. The bill was passed in 1930, in which case, the bill was passed in 1930.

The Government of complaint's charge is shown by his

bill, filed April 10, 1930, is after the corporation had

acquired title to the formula from Galt, is that the corporation

intentionally used Galt's formula for the purpose of

manufacture and sale of its own (K.R.C.) dishwashing powder; that

this constituted unfair competition, that the corporation and the

individual defendants ought to be restrained from continuing the

practice and be required to pay damages and account to complainant

for his sales made. With respect to Galt's contention, however, the

complainant found that by virtue of the bill of sale from complainant

to defendant Galt, the bill of sale was valid and enforceable, and

the corporation had the right to manufacture a product under the formula

for Galt's formula, as it is a bill of sale and is valid and

enforceable under the laws of the State of New York, and that

the bill of sale is valid and enforceable, and that the corporation

will not be restrained by complainant from continuing to

manufacture and sell its product.

The complainant was entitled to the formula, and found,

that the corporation had acquired all rights, title and interest in

and to the use of complainant's formula by assignment of the bill of

sale from Galt, April 10, 1930. It was found in that case

that it was unnecessary to determine from the evidence whether

the formula used by the corporation after said date is the manufacture

of Galt or a new formula as the "Galt's formula" formula.

and it would logically follow that there would be no violation of

unfair competition laws on the alleged ground that a formula

is used by the corporation and succeeded on other. Either would

complainant be entitled to the injunctive relief sought to restrain the corporation from manufacturing or selling products made in imitation of complainant's product under the formula then owned by the corporation. The only question then remaining would be the liability, if any, arising from the wrongful use of the formula from February 1, 1930, when the contract was terminated, to April 15, 1931 when the rights to the use of the formula passed to the corporation, and it was as to this period that the chancellor limited the accounting on the xerference to the master.

The principal ground urged by complainant in support of his contention that the corporation did not legally acquire the rights under the assignment of the bill of sale is that the assignment dated January 2, 1930, from the American Coffee to Critices, although it is signed "American Coffee Co., John Critices, Pres.," and had the seal of the company affixed thereto, did not bear the signature of the secretary and was therefore not the assignment of the corporation but of its officers individually.

While complainant's abstract of record fails to show that the assignment bears the signature of the secretary, the additional abstract, as well as a photostatic copy of the assignment introduced in evidence, shows said assignment to contain the seal of the corporation and the signature of the secretary, written rather illegibly. Theo. B. Robertson, in his testimony, identified the writing on the exhibit as that of one Jernakes, who was in fact secretary of the American Coffee Company.

Moreover, the rule is well settled that the seal of a corporation is used to evidence and authenticate papers and obligations of the corporation, and cannot properly be attached to the obligations of an individual, and when the seal of the corporation appears upon an instrument it becomes prima facie evidence of the assent of the corporation and of authority to execute the instrument. (Reed v.

complaint be entitled to the injunctive relief sought on grounds
the corporation from manufacturing or selling products made in
violation of complainant's patent under the formula then owned by
the corporation. The only question then remaining would be the
likelihood, if any, arising from the wrongful use of the formula from
February 1, 1930, when the contract was terminated, to April 1, 1932
when the right to the use of the formula passed to the corporation,
and it was on this point that the objection limited the recovery
and on the procedure in the matter.

The principal ground urged by complainant in support of
his contention that the corporation did not legally acquire the
rights under the assignment of the bill of sale is that the assign-
ment dated January 1, 1932, from the inventor to the corporation,
although it is signed "Inventor Walter L. Reed, Jr., 1932,"
and has the seal of the company affixed thereto, did not bear the
signature of the inventor and was therefore not the assignment of
the corporation but of the officer individually.

While complainant's objection to recovery fails on other than
the assignment because the signature of the inventor, the additional
evidence, as well as a photostatic copy of the assignment instrument
in evidence, shows each assignment to contain the seal of the cor-
poration and the signature of the inventor, which under Illinois
law, is sufficient in his testimony, established the validity of the
assignment as that of the corporation, and on this recovery of the
inventor under company.

However, the rule is well settled that the seal of a cor-
poration is used to evidence and authenticate papers and signatures
of the corporation, and cannot properly be attached to the signature
of an individual, and also the seal of the corporation appears upon
the instrument of assignment signed by the inventor in the name of the
corporation and it is held that the assignment is made by the corporation.

Fleming, 209 Ill. 390, 394.) It was likewise held in the case of Springer v. Bisford, 55 Ill. App. 198 (affirmed 160 Ill. 495) that a bill of sale executed by the vice president of the corporation under its corporate seal is prima facie sufficient to pass the title of the corporation to the property therein conveyed. In Miers v. Coates, 57 Ill. App. 216, where the question arose as to whether a note, reciting on its face, "We promise to pay," and signed "Columbian Athletic Club, Dominick C. O'Malley, President, Chas. J. Miers, Treas.," was the note of the individuals or of the corporation, the court said (p. 220):

"A corporation can act only by its officers and agents; and where the name of a corporation is signed to an instrument that may well be its own, and its name is followed by the name of its president, described as such, and at the left hand of the bottom of the instrument, where attesting signatures are usually placed, the name of another officer is affixed with a word descriptive of his office following his name, the presumption is at least prima facie that the instrument is the obligation of the corporation and not of the individuals whose names, with words descriptive of their official capacity, follow the name of the corporation."

Under the circumstances there can be no doubt as to the validity of the assignment in question.

Furthermore, complainant is precluded from urging in this court that the assignment is ineffective, because he failed to object or except to the master's finding sustaining the validity of the assignment, although he filed many other lengthy objections and exceptions to the master's report. (Delese v. McDougall, 182 Ill. 486, 491; Reeder v. Pipe, 235 Ill. App. 89, 109; Valde v. Schrock, 283 Ill. App. 274, 286.)

It is further urged that even though the assignment of the bill of sale were effective to vest in the corporation the right to manufacture under the formula assigned, nevertheless by reason of the following language employed in the bill of sale, "it is also agreed and understood between the parties concerned that they will respect each other's customers, and under no consideration will interfere in any manner," the chancellor should have enjoined the corporation from selling H. F. C., or any similar product, to complainant's customers.

The foregoing provision in the bill of sale was intended to operate as a negative covenant between the parties. It has been generally held that an injunction to restrain the violation of a negative covenant is equivalent to compelling specific performance of a contract, the principles upon which an injunction and a decree for specific performance rest being in the main the same. It is fundamental that before an injunction will issue, or specific performance of a contract granted, the terms of the contract must be clear, certain and unambiguous, and if the negative covenant is so uncertain that it cannot be specifically enforced no injunction will issue to enjoin a breach thereof. (Cleveland v. Martin, 218 Ill. 73, 89-90; citing Howell Co. v. Pope Glucose Co., 171 Ill. 350, and High on Injunctions (3rd ed.) vol. 2, sec. 1137.)

The foregoing clause contained in the bill of sale is uncertain in several respects; it does not define what is meant by "respecting each other's customers," nor by the phrase "not interfering in any manner." The covenant does not state the period of time during which it is to run, whether it refers to customers who were in existence at the time the contract was made, or those subsequently obtained, or either or both, and any injunctive order that might have been entered thereon would necessarily have had to be similarly vague and indefinite. The chancellor found that the provision in question was void as being an unreasonable restraint of trade, unlimited as to time, terms and place, and we believe properly so, for the authorities hold that a contract in partial restraint of trade, in order to be valid, must be reasonable in its terms. (Southern Fire Brick Co. v. Sand Co., 223 Ill. 616, 622; Andrews v. Kingsbury, 212 Ill. 97, 100-01.)

It is argued, erroneously we believe, that if the uncertainty in the restrictive clause of the bill of sale was incapable of enforcement that the entire bill of sale became illegal. This, however, is not the rule. A discussion of the subject in a ruling

Case Law, at page 818, contains the following:

"Contracts in restraint of trade are not contra bonos mores, and hence not within the rule that if invalid in part the invalidity necessarily affects and avoids the contract in toto. The rule is well settled that such agreements, whether under seal or not, are divisible, and when such an agreement contains a stipulation capable of being construed separately, one part of which is void because in restraint of trade, while the other is not, the latter will be given effect and enforced."

In Williston on Contracts (1920) vol. 3, sec. 1659, p. 2925, it is stated that "contracts containing promises unlawful because of too extended restrictive effect have not been held so unlawful in their general purpose as to invalidate the whole transaction of which they were a part." It was so held in Rosenbaum v. U. S. Credit System, 65 N. J. L. 255, 259 (48 Atl. 237, 239).

Lastly, it is urged that independently of the bill of sale an injunction should have issued from using the trade name, "R.P.C." on the ground that it is so similar to "D.A.C.," which was sometimes used to designate plaintiff's product, as to confuse customers. "R.P.C.," as heretofore pointed out, was taken by defendant from its corporate name, and the record shows that the corporation had used the trade name, "R.P.C.," to describe several of its articles long prior to the time that complainant selected "Daddy Ash's Cleaner," or "D.A.C." for his product. Furthermore, the letters used are different, and there is no such similarity between them as to mislead any person exercising ordinary caution. The courts have held that it is not sufficient that a possibility of confusion may arise, but that there must be a probability of such confusion to a person of ordinary observation and education. (Fairbank Co. v. Swift & Co., 64 Ill. App. 477, 491.) In Ball v. Siegel, 116 Ill. 137, complainants, who were the manufacturers of "Ball's Health-Preserving Corsets," filed a bill to enjoin defendants from using the trade name, "Schilling's Health-Preserving Corsets," which name the latter had adopted subsequently to the use of complainants' trade name, and the bill charged such

These data are available at <http://www.fishbase.org>.

...the latter will be given effect.

in violation of contract (1939) Vol. 34 Nov. 1939, 12 is
noted that "contracting procedure" was not followed in this
extended executive effort have not been held as indicated in this
current purpose as to facilitate the whole transaction of which they
are a part." It was held in Boyd v. Boyd, 1939, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 8

... it is noted that the ...
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the Senate has just filed in an ordinance that is absolutely
without force as it is signed by persons exercising authority
in private and no officials, and hence is not binding.
"That's all," he says, "but his private ordinance."
Of his articles I am quite in the same doubtful condition
concerning his trust in those names, "W. H. C.," as I have never
observed them in the original name, and the name alone has the

one of the most important of the world's great religions, and the only one which has been able to maintain its position in the face of the most powerful and aggressive of all religions, the Roman Catholic Church. It is a religion of peace, of love, of forgiveness, and of the highest ethical standards. It is a religion which has been able to survive and flourish in the face of the most powerful and aggressive of all religions, the Roman Catholic Church. It is a religion of peace, of love, of forgiveness, and of the highest ethical standards. It is a religion which has been able to survive and flourish in the face of the most powerful and aggressive of all religions, the Roman Catholic Church.

similarity as to constitute unfair competition, but the court held that although there was evidence that the advertisements and circulars were similar, complainants could not recover because of the fact that the mere adoption and use of words in advertisements and circulars, in the absence of copyright, gives no exclusive right to their use, the question in its final analysis being whether an ordinary purchaser, using ordinary care and attention, would be deceived by the similarity.

For the foregoing reasons we believe that the decree properly denied the injunctive relief sought and limited the plaintiff's recovery, if any, to an accounting for the period from February 1, 1930, to April 15, 1930.

By its cross appeal defendant corporation urges that the chancellor should not have ordered an accounting, even for the limited period, because (1) complainant came into court with unclean hands; (2) since no injunctive relief was allowed, the court should not have reserved jurisdiction merely for the purpose of stating an account between the parties; and (3) because complainant failed to prove the ownership of the formula or process claimed to have been infringed.

To support the first of these contentions, defendants adduced evidence tending to show that subsequent to the filing of the bill of complaint, complainant wrongfully represented to certain customers that he had procured an injunction to restrain the corporation from selling R.P.C. products, and that the complainant also tried to persuade one of the corporation salesmen, Xanthes, to enter into a secret arrangement with him by which the latter was to sell Daddy Ash's Cleaner for complainant without revealing this fact to his employer. Both of these charges were denied by complainant's witnesses. It thus became a question of fact, and since neither the master nor the chancellor made findings with reference thereto favorable to defendants, we are not disposed to deny complainant such

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For the foregoing reasons we believe that the above

complaints should be dismissed with prejudice and limited the
complaints to the period of the period from
February 1, 1930, to April 10, 1930.

It is also noted that the complaint was filed on the
complaint should not have been entered as a complaint, even for the limited
period, because (1) complaint was not filed with proper fees;
(2) there was no injunctive relief was allowed, the court should not have
granted injunctive relief for the purpose of obtaining an account
between the parties; and (3) because complaint failed to prove the
ownership of the lands or process claimed to have been infringed.

To support the facts of these conditions, respondents
advanced evidence tending to show that respondent on the filing of
the bill of complaint, complaint was properly represented as certain
complaints that he had procured an injunction to restrain the com-
plaint from selling N.L.G. products, and that the complaint was
typed to persons one of the respondents, respondent, and
enter into a secret arrangement with him by which the latter was to
sell N.L.G. products for respondent without revealing the fact
to his superior. Both of these charges were denied by respondent's
affidavit. It thus became a question of fact, and since neither the
complaint nor the respondents were liable with respect to these charges
also be determined, we are not disposed to deny complaint such

relief as the chancellor decreed he should have.

As to the second point, we deem it sufficient to point out that the bill of complaint charges sufficient facts with reference to the use of complainant's formula prior to April 15, 1930, to justify an accounting, and considerable evidence was adduced on this branch of the case. Therefore, aside from the question of injunctive relief, the bill will lie because it involves a complicated accounting, involving many items, sales and transactions. (Townsend v. Equitable Life Insur. Co., 365 Ill. 432, 439; Green Seal & Tow Co. v. Thomas, 177 Ill. 534, 540; and Miller v. Russell, 224 Ill. 68, 73.)

As to the ownership of the formula, the records show that complainant was not the inventor thereof, but he exercised proprietary rights thereunder which were not challenged, and we believe he was entitled to the use of the formula prior to his assignment thereof to American Coffee Company.

Finding no reversible error in the decree it will be affirmed, and it is so ordered.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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37720

MARY RICHARDSON, administratrix
of the estate of Roberta Guyton,
deceased,

Appellee,

v.

METROPOLITAN FUNERAL SYSTEM
ASSOCIATION, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 633²

MR. PRESIDING JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

Mary Richardson, administratrix of the estate of Roberta Guyton, deceased, brought an action of assumpsit in the municipal court of Chicago to recover \$400 alleged to be due under a burial certificate issued to deceased in her lifetime. Trial was had by jury, resulting in a verdict and judgment for \$400, from which defendant appeals.

Plaintiff's statement of claim alleges that March 24, 1930, defendant issued its certificate of membership to plaintiff's intestate, therein agreeing that in consideration of payment of a weekly premium of twenty cents defendant would furnish a \$400 funeral and burial upon the death of insured; that plaintiff's intestate at all times paid the premiums required by the certificate and complied with all its provisions; that when plaintiff's intestate died November 12, 1931, plaintiff furnished defendant with the required evidence of death, and demanded payment; that defendant promised to furnish said funeral as provided by said contract, obtained the body of plaintiff's intestate, embalmed it and then refused to complete the burial; by reason whereof plaintiff was obliged to have the body removed from defendant's custody and buried at the expense of decedent's estate, and that there then became due plaintiff

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of the subject of "World War I"

• *Journal of the American Medical Association*

EXHIBIT ALPHABETICALLY BY DATE

PAGE TWO - WOULD BE CLOSING OFFICE TODAY. ADVISES THAT

Very respectfully,
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the project was completed in 1936, and the project was

1942 a. Rainfall from January to June was 14.5 inches, 1942

**Ullrich-Dy* said she used to sleep with her hand on her chest.

Intelligence is all about the knowledge required by the individual to understand the world and to make decisions about it. It is the ability to acquire, process, and use information to solve problems and make choices. Intelligence is a complex phenomenon that involves a variety of factors, including cognitive abilities, personality traits, and social influences. It is a key component of human development and is essential for success in many areas of life.

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U.S. GOVERNMENT PRINTING OFFICE: 1967

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the sum of \$400 which defendant, upon request, refused to pay.

Defendant's affidavit of merits denies that Roberta Guyton paid the premiums required to be paid or that she complied with all the provisions of the burial certificate; avers that said certificate of membership provided among other things that in no case should there be a recovery "unless and until she, the said Roberta Guyton, paid to the said defendant the sum of twenty cents on each and every Monday after March 24, 1930, during the life of said Roberta Guyton," and also unless, at the time of her death, she was a member in good standing as defined by defendant's by-laws; avers that November 11, 1931, she had failed to pay to defendant the following sums: twenty cents that became due October 26, 1931, twenty cents due November 2, 1931, and twenty cents due November 9, 1931; avers that Roberta Guyton, for the purpose of procuring her membership, signed an application which provided among other things that "no action at law or in equity shall be maintained upon any certificate of membership that may be issued to me, when and if this application is approved, unless same is brought within one year from the time said action accrues;" that said Roberta Guyton died November 12, 1931, and plaintiff was appointed administratrix of her estate March 30, 1932; and that the action herein was not brought within one year, as provided in said application.

Defendant's first and principal contention is that decedent owed three premiums at the time of her death and was therefore in default under the provisions of the certificate of membership, and not in good standing. This contention is evidently based upon the by-laws of the corporation. Section 3 of Article 3 provides that any member failing to pay his weekly premiums later than 4:00 o'clock in the afternoon of every Monday, after becoming a member, is to be deemed not in good standing and deprived of his burial benefits. Another article of the by-laws provides that

the sum of \$100 which defendant, upon payment, returned to pay.
Defendant's affidavit of service dated March 1932, wherein
said the premises required to be paid by him and completed with all
the provisions of the burial certificate; where said said certificate
of membership provided among other things that in no case should
there be a recovery "unless and until the said certificate is
paid to the said defendant the sum of twenty cents on each and every
Monday after March 24, 1932, during the life of said Robert Brown,
and also unless, at the time of her death, she was a member in good
standing as defined by defendant's by-laws; where that November 11,
1931, she had failed to pay to defendant the following sums: twenty
cents that became due October 24, 1931, twenty cents due November 2,
1931, and twenty cents due November 9, 1931; where that Robert
Brown, for the purpose of obtaining her membership, signed an
application which provided among other things that she would be
in good standing when she was admitted to membership
that may be found in the said application is returned,
unless some in default within one year from the time said
membership was due; where that Robert Brown died November 14, 1931, and said
said application provided that the said Robert Brown was, at the time of
his death, in good standing and was therefore in good
standing as defined by defendant's by-laws; and that
of the said application, Article 2 of which provided that any member
failing to pay his weekly premiums later than two weeks in the
extended of every Monday, after becoming a member, is to be deemed
not in good standing and deprived of his burial benefits. Section
Article 2 of the by-laws provides that

"a grace period of 15 days, without interest charge, will be granted for the payment of every premium after the first day, which period the rights to benefits shall continue in force. At the end of the grace period the funeral benefits will automatically cease and be rendered null and void, and all payments made on said benefits up to that time shall thereupon be forfeited to Funeral System as a consideration for the protection and benefits given to said person while he was a member in good standing."

It appears from the premium receipt book in evidence that decedent had at no time between the months of June and November, 1931, paid her premiums on their due dates. The premium due June 22 was paid June 24; June 29 was paid July 2; July 6 was paid July 9; July 13 was paid July 15; July 20 was paid July 22; August 3 was paid August 6; August 10 was paid August 13; August 17 was paid August 20; the premiums of August 24 and August 31 were paid September 3; September 7 was paid September 10; September 14 was paid September 24; September 21 was paid October 1; September 28 was paid October 15; October 5 was paid October 22; October 12 was paid October 29, and October 19 was paid November 5. Decedent died November 12.

It is evident that neither of the foregoing inconsistent provisions of the by-laws relating to default and forfeiture was enforced by defendant in the instant case. Any rights that it may have had to insist on prompt payments as provided in section 3 of article 3 were waived by the acceptance of premiums after their due date continuously for a period of approximately five months. The 15-day grace period provided for in the by-laws was likewise waived, for defendant accepted a premium October 15 which became due September 22, more than 15 days after the period of grace had begun to run, and it treated the certificate as though it were in full force and effect by collecting premiums October 22, October 29 and November 5, at regular weekly intervals. At no time did defendant notify decedent that it would insist on prompt payment of premiums as provided in its by-laws, but it continued to receive them after they became due on practically every premium date for five months preceding her death. The acceptance of premiums during this long period

of time with unvarying regularity estopped defendant from claiming that the certificate had lapsed because of either of the foregoing provisions. Forfeitures are not favored, and courts are always reluctant to enforce them and will readily seize hold of any circumstance indicating an intended waiver, especially where the alleged forfeiture appears to be contrary to equity and good conscience. We so held in Routa v. Royal League, 274 Ill. App. 152, and there also said that where the evidence shows an established practice of accepting delinquent assessments in violation of the provisions of the organization relating to suspension and forfeiture, and where it had accepted delinquent payments from a deceased member over a long period of time, the organization is deemed to have waived its laws as to suspension and forfeiture, and cannot be heard to say that the deceased member's benefit certificate had been forfeited at the time of his death because of arrearages then existing. To the same effect are the following: Monahan v. Fidelity Mutual Life Ins. Co., 242 Ill. 498, 494; Illinois Life Ass'n v. Wells, 200 Ill. 445, 452; May on Insurance, Third Edition, vol. 2, sec. 361, p. 776.

It is urged, however, that plaintiff, having alleged performance of the conditions of the membership certificate, cannot rely upon a waiver, because the same is not specially pleaded. Since defendant made no objection in the trial court to the introduction of evidence relative to the manner in which premium payments were made, it is now barred, under the Civil Practice Act from raising any defects in pleadings, either in form or substance, which were not there preserved by proper objection. (Chap. 110, sec. 156 (3), with-Murd Revised Statutes, 1933.) Rule 104 of the Municipal court of Chicago, which became effective prior to the trial of this cause, and of which we take judicial notice, (Capital State Savings Bank v. Larson, 255 Ill. App. 479), likewise precludes defendant from raising the question. That rule provides in effect that a new trial

shall not be granted or any judgment vacated or set aside, after a trial and a finding by the court or a verdict of a jury, on the ground of the insufficiency in law of any pleading, unless it appears that no reasonable cause of action or defense exists and no legitimate amendment can cure the defect, and the rule also requires that prior to the trial such insufficiency in law be brought to the court's attention by proper motion. A note appended to rule 104, contained in the official copy of the court's rules, states the reason for the rule as follows:

"A party who, knowing there is a defect in an opponent's pleading which will render a judgment in the opponent's favor erroneous, quietly stands by and permits the court to go through with the trial of the case, should not be permitted to profit by his silence. The best way to prevent such reprehensible practice is to make such provisions by rule as will render it unavailing to the guilty party."

Defendant next contends that plaintiff's failure to bring suit within the one-year provision of the by-laws bars a recovery. To avail itself of this defense it was incumbent upon the defendant to prove (1) that the by-laws were adopted according to the procedure prescribed by the fundamental law of the Association (Metropolitan Accident Ass'n v. Winderover, 137 Ill. 417, 434); (2) that the by-laws became effective prior to the time that decedent became a member; (3) or, if adopted subsequent to the date of her membership, that she had knowledge thereof or expressly agreed to be bound thereby. (Covenant Mut. Life Ass'n v. Kentner, 188 Ill. 431.) The only witness who testified with respect to the by-laws was defendant's secretary, Fred Lewing. He brought with him, and identified, the minute book of the Association, and stated that the by-laws were adopted at a meeting held December 23, 1929, pursuant to the posting of a notice of the meeting in the window of defendant's place of business. The minutes failed to state that a quorum was present, or who voted on the adoption of the by-laws. Lewing sought to supply these details by testifying that he believed there were some 30 or 40 persons present, but could

not state who they were. When examined with reference to other meetings held prior to the one in question, he could not remember any detailed facts. Plaintiff insists that the by-laws were adopted at a much later date, and after decedent joined the association. This fact became important. It is earnestly argued that Lewing's cross-examination showed his memory to have been so faulty, and his evidence so unreliable, as to cast considerable doubt upon his credibility. In any event, it became a question for the jury to pass on his credibility and determine, among other things, whether or not the by-laws were adopted on December 23, 1929, or at a later date. If they became effective after March 24, 1930, when decedent acquired her membership certificate, her administratrix would not be bound thereby unless she (decedent) had expressly agreed to be bound. The membership certificate contains a provision that "each and every by-law of said System shall likewise be binding upon said member, his heirs, executors and administrators," but this, in our opinion, is not sufficient under the authorities hereinbefore cited. According to Lewing there were only two copies of the by-laws in existence, one of which was contained in the minute book of the association, and the other that had been filed with the Department of Insurance in Springfield. Moreover, we find what purports to be a complete abstract of the by-laws on the back of decedent's membership certificate, but no mention is made therein of the one-year limitation provision. Since neither the decedent nor her administratrix had ever seen the by-laws, only two copies of which were in existence, plaintiff was justified in assuming that the regular statutory period existed in which to file suit, and the court ought not, under the circumstances, shorten the period of limitation because of the omission of defendant to include what it now contends to be an important provision of the by-laws. It has been held that where a synopsis of the by-laws is included on the membership certificate, thus leading

the beneficiary to believe that it contains all provisions of the association, the beneficiary has a right to rely on such synopsis, and the association is thereafter estopped to deny liability under a law which was overlooked because of this omission. (Bierbach v. Mutual Benefit Health & Accident Ass'n, 100 Neb. 675, 679; National Masonic Acc. Ass'n v. Titman, 58 Ill. App. 642, 645.)

Lastly, it is argued that the Metropolitan Funeral Corporation, being the beneficiary under the certificate would be the only one entitled to recover. This contention is based on the following facts: There were two corporations involved in this proceeding, with somewhat similar names, viz., defendant herein, Metropolitan Funeral System Association; a corporation organized under the Burial Act of Illinois (Smith-Hurd 1933 Rev. Stat., chap. 73, par. 490a, sec. 3a), and the Metropolitan Funeral Corporation, organized under the laws of Illinois, which is not a party to the suit but a guarantor of the burial. Defendant calls attention to that part of the membership certificate issued to plaintiff's intestate which provides "that the Metropolitan Funeral Corporation, an Illinois corporation, shall furnish the burial," and another provision in the certificate which "specifically confirms the designation of the Metropolitan Funeral Corporation as beneficiary of the aforesaid \$400 funeral benefits, and confirms and ratifies any contract entered into between the Metropolitan Funeral System Association and Metropolitan Funeral Corporation whereby said Metropolitan Funeral Corporation undertakes to furnish a first class funeral and burial for all members of said Funeral System," and argues that because of these provisions plaintiff's intestate is not entitled to the funeral benefits. The facts disclose that when Roberta Guyton became a member of the association March 24, 1930, there was indorsed on her certificate a promise to issue a new certificate as soon as the Director of Trade and Commerce approved it. Up to the time of her death, November 12, 1931, no new certificate was issued. Plaintiff points out that the

old certificate was not in conformity with the requirements of the act under which defendant was incorporated, as amended in 1929, and calls attention to that part of the statute which provides that

"The benefit of such certificate after the passage of this act shall only be made payable to a member's estate or to a person who would be entitled to take of such member's estate under the provisions of 'An act in regard to the descent of property,' approved April 9, 1872, as amended, if such member would die intestate, as such member may determine." (Chap. 73, Sec. 491, Smith-Hurd's Ill. Rev. Stats., 1931.)

Under the circumstances, the Metropolitan Funeral Corporation could not be the beneficiary in contravention of the statute, and this was especially true in the instant case because the latter corporation was an agent of defendant. Our courts have held that the statutes of this state must be regarded as entering into and forming a part of the contract between parties to the same extent as if embodied therein. (Bell v. Mutual, 320 Ill. 400, 408.)

Other points are raised by counsel's brief. We have examined them carefully but find no convincing reasons therein for reversal. Therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

all countries as was not in conformity with the provisions of the
the order which has been issued, as amended in 1911, and
which is contained in the part of the statute which provides that
"the benefits of such certificate shall be enjoyed by this act shall
only be made payable to a member's estate or to a person who would
be entitled to the same under the provisions of the act."
It is not in conformity with the provisions of the act, as such member
has no right to the same, as the statute says that the benefits
shall be paid to the estate of the member, and not to the member
himself.

Under the circumstances, the representative member of the state
has not the authority in controversy of the statute, and this was
especially true in the present case because the latter corporation
was in good standing. The court has held that the statute
of this state must be regarded as authorizing him and having a right
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37745

ALEX REINOWSKI,
Appellee,

v.

GUY A. RICHARDSON, as receiver
of Chicago Railways Company,
etc., et al.,
Appellants.

927
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

279 I.A. 633³

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in tort to recover damages for personal injuries alleged to have been sustained while riding as a passenger on a street car operated by defendants. Trial was had by jury, resulting in a verdict and judgment in favor of plaintiff for \$3,800, from which defendants appeal.

The amended declaration charged that plaintiff was in the act of boarding an east bound street car at the intersection of Armitage and Karlov avenues in Chicago; that it was defendants' duty to give him an opportunity to safely board said car and to keep it standing for a reasonable time to enable plaintiff, a passenger, to safely board the car; that disregarding this duty, and while plaintiff was in the exercise of all due care for his own safety, defendants carelessly, negligently and improperly caused said car to suddenly and violently jerk, start and move, thereby causing plaintiff to be thrown from said car with great force and injured. Defendants filed a plea of the general issue.

Plaintiff's version as to the cause of his injuries is completely at variance with the testimony of defendants' witnesses. He stated that August 18, 1932, shortly before 8:00 o'clock in the morning, he, along with several other passengers, boarded an east

bound car which had stopped at the south west corner of Armitage and Karlov avenues; that he was one of the last to get on, and was standing about "a foot or so in on the platform," with his back to the upright bar that runs from the ceiling of the car down to the platform, along with other passengers, waiting to pay his fare, when the car started forward. The conductor began to collect fares, and after the car had run about 10 or 15 feet it suddenly "started to lurch" or "sway," and plaintiff stated that "I lost my legs and grabbed for the center rail, and I missed that, and I was dumped off. * * * I remember nothing after I fell."

Five of defendants' witnesses, including the motorman and conductor, testified that the car started up in the usual way, and that it did not jerk, lurch or sway at any time. Four of these were eyewitnesses, and testified that plaintiff stepped off the car after it had started to move, and that he stood on the pavement a moment or two, when he was struck and knocked down by an automobile passing the street car.

Edward H. Bellerive, employed by the Railway Express Company, stated that he boarded the car at the same intersection as plaintiff; that five or six persons got on the car there while it was standing still; that after the car had gone about 10 feet plaintiff stepped off the car and had his two feet on the pavement about a second or two, when a Chevrolet automobile came from the rear around the right side of the street car and hit plaintiff; that it twirled him around two or three times, caused him to fall backward and strike his head on the pavement. The witness said that he was waiting for his change from the conductor, standing directly opposite plaintiff when he got off the car; that the car started up from a standstill, going very slowly at first, and that there was no jerking or lurching or swaying; that when plaintiff was picked up he was lying on the west side of Karlov avenue, "right close to the sidewalk,

11. * * * I remember nothing after I fell.

There is a small, white, rectangular object, possibly a piece of paper or a small box, lying on the surface. It is oriented horizontally and appears to have some text or markings on it, though they are not clearly legible. The object is surrounded by a dark, textured material, possibly a book cover or a piece of fabric. The lighting is somewhat uneven, with the object being brighter than the surrounding area.

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...that he reached the car at the same instant as ...
...that five or six persons got on the car there while it ...
...that after the car had gone about 10 feet ...
...that the car had hit the foot on the pavement about ...
...that a Chevrolet automobile came from the rear ...
...that the right side of the street car and his ...
...that he ...
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...that the car started up from a ...
...that there was no ...
...that when ...
...that the ...

er between the curbside and the sidewalk," and that a moment later a taxicab came along, taking plaintiff to the hospital.

Leon M. Roche, who is engaged in the publishing business, testified that he boarded the car at the intersection in question. He paid his fare, the car started, and he remained on the platform. He said he noticed plaintiff alight from the street car just after it started, stepping off into the street; that he remained standing there for just a few seconds, when an automobile coming from the west passed the street car and sideswiped him; that he was "pushed" around, fell on his back, and struck his head. This witness likewise testified that the car started smoothly, and that there was no jerking or swaying at the time.

John Bado, a third witness for defendants, testified that he was employed in the electrical department of the Chicago Surface Lines and was on his way to work when he witnessed the accident; that he boarded the street car at Kostner avenue; that it stopped at Karlov avenue, where 5 or 6 people got on, then started and went 10 or 12 feet before anything happened; that the car made an even start, and that there was no jerking, swaying or any unusual motion of the car at all; that he saw plaintiff get on the car and a moment later saw him step out backward and observed that he was struck by an automobile, twisted around three or four times, and thrown to the pavement; that the automobile was going east, and did not stop after the occurrence. The conductor and another man picked plaintiff up, put him in a Checker cab, and he was taken away. The witness testified that he was not acquainted with, and had never seen the conductor or motorman before. He also stated that after plaintiff got on the platform he stood there for a moment, then stepped back on the step and off on to the pavement; and that almost simultaneously the automobile passed and struck him.

William Uhl, the conductor, stated that the car stopped

to follow the witness and the witness, "and that a witness

later a witness came along, coming directly to the hospital.

Then W. K. Koebe, who is engaged in the publishing business,

testified that he bounded the car at the intersection in question.

He told him that, the car started, and he remained on the ground.

He said he noticed slightly right from the street and that after

it started, stepping off into the street; that he remained standing

there for just a few seconds, when an automobile coming from the

west passed the street car and acknowledged that that was "pushed"

around, fell on his back, and struck his head. This witness likewise

testified that the car started smoothly, and that there was no jolting

and no swaying at the time.

John Bado, a third witness for defendants, testified that

he was engaged in the electrical department of the Chicago Tribune

when and was on his way to work when he witnessed the accident;

that he bounded the street car at Madison Avenue; that it stopped

at Madison Avenue, where 5 or 6 people got out, then started and

went 15 or 20 feet before anything happened; that the car made no

even sound, and that there was no jolting, swaying or any unusual

action of the car at all; that he saw Plaintiff get on the car and

a woman later saw him step out behind and observed that he was

dropped by an automobile, which witness later at that time, and

known to the defendant; that the automobile was going west, and did

not stop after the occurrence. The defendant and another man picked

Plaintiff up, put him in a limousine cab, and he was taken away. The

witness testified that he was not acquainted with, and had never

seen the defendant or defendant before. He also stated that after

Plaintiff got on the platform he stood there for a moment, then

stepped back on the step and all on to the platform; and that immediately the automobile passed and struck him.

William E. E. the defendant, stated that the car stopped

at Karlov avenue to receive 3 or 4 passengers; that after he saw all of the passengers on the platform he signalled the motorman to go, and the car started; that there was no jerking or swaying as the car ran along; that they went about 7 to 10 feet, when all of a sudden he saw plaintiff standing on the street, and one or two seconds later a machine going east on the right side of the car hit plaintiff and knocked him down; that when the car stopped he went over and with the help of another person standing on the street picked plaintiff up, placed him in a taxicab and requested that he be sent to a hospital.

The fifth witness for defendants was Charles Grew, the motorman, who testified he had been a motorman for 30 years; that after making a stop at Karlov avenue on the morning in question he was given the signal to start, and went about 15 feet when he heard the emergency signal and stopped; that he started the car at Karlov avenue with a slow, even motion, without any jerking or swaying, and came to a stop when the emergency signal sounded, as quickly as possible.

Four of defendants' witnesses said that the automobile which struck plaintiff kept right on going, and none of them obtained the license number. Their testimony varied somewhat with reference to details relative to the color and description of the automobile and the manner in which plaintiff stepped from the car, but all of them stated positively that he left the car shortly after he boarded the same, and that they saw him standing on the pavement for several seconds before he was hit by the passing automobile.

The only other occurrence witness for plaintiff was one Marie Wiley, driver of a Checker taxicab, who testified that he was driving east on Armitage avenue and noticed a street car, standing still, near the corner of Karlov avenue; that thereafter the car started and moved about 15 or 20 feet, and again stopped; that he

at Kailash Avenue to receive 3 on 8 emergency; that after he saw
all of the passengers on the platform he signalled the motorcar
to go, and the car started; that there was no feeling of stopping
at the car ran ahead; that they went about 10 to 15 feet, when all
of a sudden he saw Plaintiff standing on the street, and saw an
two women take a machine going west on the right side of the car
his Plaintiff and knocked him down; that when the car stopped he
went over and with the help of another person standing on the street
picked Plaintiff up, placed him in a taxicab and requested that he
be sent to a hospital.

The fifth witness for defendants was William Brown, the
motorcar, who testified he had been a motorcar for 20 years; that
after making a stop at Kailash Avenue on the morning in question he
was given the signal to start, and went about 15 feet when he heard
the emergency signal and stopped; that he started the car at Kailash
Avenue with a stop, even motion, without any feeling or anything,
and came to a stop when the emergency signal sounded, as quickly
as possible.

Went at defendants' witnesses said that the automobile
which struck Plaintiff kept right on going, and none of them obtained
the license number. This testimony was similar to the testimony of
the other witnesses to the color and description of the automobile and
the manner in which Plaintiff stopped from the car, but all of them
swore positively that he had the car shortly after he bounded the
ground, and that they saw him standing on the pavement for several
seconds before he was hit by the passing automobile.

The only other defendant witness for Plaintiff was one
Mable Wilson, driver of a Chevrolet taxicab, who testified that he was
driving west on Kailash Avenue and noticed a black car, which was
stopped near the corner of Kailash Avenue and that immediately the car
started and went about 10 to 15 feet, and again stopped; that he

pulled up behind the street car, saw people standing there, and observed the motorman and conductor holding plaintiff, who was then placed in his taxi cab and by him taken to the hospital. On direct examination this witness stated that he was looking straight ahead as he approached the street car, and did not see any other automobile ahead of him, but on cross-examination said that "an automobile could have possibly passed previous to that time."

This is not a case where the uncorroborated testimony of the plaintiff is contradicted by one unimpeached witness only. Plaintiff was flatly contradicted on the essential fact on which he bases his case by five unimpeached witnesses, all of whom were in as good position to know whether the car jerked or swayed as was plaintiff, and each of them testified positively that it did not do so. Moreover, four of defendants' witnesses stated positively that plaintiff had stepped from the car and was standing on the pavement momentarily when struck by a passing automobile. Under ordinary circumstances the number of witnesses alone, testifying for or against an essential fact, do not necessarily determine the weight or preponderance of the evidence, but in this case plaintiff's testimony is so utterly irreconcilable with that related by defendants' witnesses, and so inconsistent with the probabilities of the circumstances shown, as to lend support to defendants' contention that the verdict was against the manifest weight of the evidence. Plaintiff's theory of recovery was that the car jerked and swayed. By his own testimony it is admitted that the car had proceeded only 10 or 12 feet when he was thrown. All the other witnesses stated that the car started out slowly, and it is difficult to believe that sufficient speed could have been attained to cause so heavy a vehicle as a street car to sway in so short a distance. Five witnesses testified that the car did not jerk as it started. Plaintiff is the witness who says that it did. While it is true that three of

waited up behind the crowd and saw people standing there, and
observed the witness and defendant standing together. He was
then placed in his position and by him taken to the hospital. On
direct examination this witness stated that he was looking straight
ahead as he approached the street car, and did not see any person
automobile ahead of him, but on cross-examination said that "an
automobile could have possibly passed him at that time."
This is not a case where the uncorroborated testimony of
the plaintiff is contradicted by one unimpaired witness only.
Plaintiff was directly contradicted on the essential facts on which he
bases his case by five unimpaired witnesses, all of whom were in an
excellent position to know whether the car looked as heavy as plain-
tiff, and each of them testified positively that it did not do so.
Moreover, four of defendants' witnesses stated positively that plain-
tiff had stepped from the car and was standing on the pavement
immediately when struck by a heavy automobile. Their ordinary
circumstances the number of witnesses alone, testifying for or
against an essential fact, do not necessarily determine the weight
or preponderance of the evidence, but in this case plaintiff's
testimony is so directly inconsistent with facts related by defen-
dants' witnesses, and so inconsistent with the probabilities of the
circumstances above, as to leave no room for defendants' contention
that the verdict was against the manifest weight of the evidence.
Plaintiff's theory of recovery was that the car looked and weighed
by his own testimony as it admitted that the car had proceeded only
10 or 15 feet when he was thrown. All the other witnesses stated
that the car started out slowly, and it is difficult to believe that
relatively speed could have been attained so soon as heavy a vehicle
as a street car is going in an urban area. These witnesses
testified that the car did not look as it started. Plaintiff in the
evidence also says that it did. While it is true that three of

defendants' witnesses were employees of the Railways Company, nevertheless the other two were entirely disinterested, and in this connection plaintiff's own testimony must be considered in the light of the fact that he was personally interested in the result of the suit, and that the natural human element of self-interest entered into his testimony. A reviewing court will not usurp the province of a jury in passing upon conflicting questions of fact, but the courts have not hesitated in setting aside verdicts where the unsupported testimony of the plaintiff is contradicted by numerous witnesses of equal credibility, and where the attending circumstances reflect considerable doubt upon the facts supporting the verdict. In Pearlee v. Glass, 61 Ill. 94; Pick v. Jensen, 137 Ill. App. 58; and Weiss v. Belt Railway Co. of Chicago, 186 Ill. App. 43, 46, the courts set aside verdicts where the unsupported evidence of the plaintiff was contradicted by numerous other witnesses and where there were no other elements of probability present to turn the scale. After a careful examination of the record in this case, we are of the opinion that the judgment entered on the verdict should not stand.

Inasmuch as this cause will have to be retried, we deem it unnecessary to pass upon other questions raised, except one. Plaintiff urges that there are no assignments of error in the abstract of record. We held in Travelers Ins. Co. v. Wagner, 379 Ill. App. 13, that an appeal, under section 74 of the Civil Practice Act, (Edhill's Revised Statutes, chap. 110, par. 202, in effect January 1, 1934) is now a continuation of the proceedings in the trial court, bringing the whole record to the reviewing court. It was pointed out in the foregoing opinion that formal assignments of error were only required by rule of court and not by statute (Ditch v. Bennett, 116 Ill. 203), and since the present rules of the Supreme and Appellate courts contain no provision for assignments of error, they are unnecessary.

For the reasons stated herein, the judgment of the trial court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan and Sullivan, JJ., concur.

1933

2

37361

DAVID LIPMAN,
Appellant,

v.

ARTHUR V. GOEBEL and
EDWARD SCHATZ,
Appellees.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

279 I.A. 633⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The chancellor sustained defendants' "general and special demurrer" to complainant's second amended bill and complainant appeals from a decretal order dismissing bill for want of equity.

The defendants in the instant case commenced an action in trespass against complainant. In that action a certain contract (hereinafter quoted in full) between complainant and defendants, which forms the basis for the instant bill, was directly involved. The jury, in the trespass case, returned a verdict finding complainant guilty and assessing defendants' damages at the sum of \$6,000, and complainant appealed to this court from a judgment entered upon the verdict. We affirmed the judgment, upon a remittitur (see Goebel et al. v. Lipman, 265 Ill. App. 601, Abstract Opinion), and thereafter a certiorari was denied by the Supreme court (see 265 Ill. App. xiv). Complainant was then arrested and imprisoned under a capias ad satisfaciendum issued upon the judgment in that case. He then filed, in the County court, a petition, under the Insolvent Debtors act, to be released from such imprisonment. In a trial before the court, without a jury, there was a finding that malice was the gist of the action in which the judgment was recovered against complainant and he was remanded to the custody of the sheriff. An appeal was taken by complainant to the Supreme court, where the judgment of the County

1. 3. 11. 1999

47

1. ARTHUR V. GORDON
 2. STANLEY GORDON
 3. STANLEY GORDON

[illegible]

The character of the character is the character of the character.

...wants to show you this photograph before leaving a note to you.

The defendant in the instant case admitted no action was taken against the defendant. In that action a motion picture (hereinafter quoted in full) between complainant and defendant, which shows the basis for the instant bill, was actually introduced.

and associated defendants' damages at the sum of \$5,000, and

verdict. It allowed the judgment, upon a verdict, to be set aside and a new trial granted, upon a finding of error in the judgment.

1. Introduction

Confidential was this extracted and captioned under a heading as

He followed the usual procedure, in a local doctor's office,

THE UNIVERSITY OF CHICAGO PRESS

of complaint in the present case, since the defendant at the time

court was affirmed. (See Lipman v. Goebel et al., 357 Ill. 315.)
Complainant's motion to grant him an appeal to the Supreme Court of the United States and that the appeal be made a supersedeas was denied on February 7, 1934. Complainant filed a petition in the Supreme Court of the United States for a certiorari, which was denied, and on February 12, 1935, our Supreme court caused a mandate to be issued. The bill in the instant case was filed after our Supreme court had refused a certiorari in the trespass case.

The second amended verified bill is a very lengthy one and takes up forty-two pages of the abstract. The following are its material allegations: Complainant alleges that he has been a practicing lawyer since 1920; that on November 21, 1929, he and defendants executed the following written agreement:

"Agreement.

"This Agreement entered into by and between David Lipman, hereinafter designated as first party and Arthur V. Goebel and Edward Schatz, hereinafter designated as second party, all of the City of Chicago, Cook County, Illinois;

"Witnesseth:

"Whereas, first party has agreed to sell and deliver unto the second party his law business, accounts receivable, choses in action, divers items of personal property and other goods and chattels as hereinafter enumerated, and

"Whereas, second party has agreed to purchase the same at the price and upon the terms as herein stated.

"Now Therefore, for One (\$1.00) dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged by each of the parties hereto, one unto the other, and of the performance of the covenants and conditions hereinafter set forth, and the mutual execution of these presents, it is hereby agreed:

"1. First party does hereby agree to and does hereby sell, transfer and convey unto second party, at the price of \$12,500.00 all of the following:

"A. Capital stock issued and outstanding of the shares of the Apartment House and Hotel Association, an Illinois Corporation, amounting to \$5000.00.

"B. Property of said association consisting of furniture, furnishings, carpeting, books, bookcases, chairs, records, desks, files, typewriters and all other property belonging to said association, including all cuts, rights and advertising contracts inuring to the Apartment House and Hotel Guide, and membership applications and accounts receivable of said Apartment House and Hotel Association, except advertising accounts receivable.

"C. Assignment of lease to suite of offices No. 1325-1327-1329 Burnham Building, 160 N. LaSalle Street.

"D. Law business of said first party, including outstanding fees on pending business, excluding however, all accounts receivable for work heretofore completed, a copy of which is hereto attached marked Schedule A, and cases or claims in which first party has an interest as plaintiff or defendant.

court was affirmed. (See James V. Goodel et al., 257 Ill. 312.)
Complainant's motion to grant him an appeal to the Supreme Court of
the United States and that the appeal be made a superintendence was denied
on February 7, 1934. Complainant filed a petition in the Supreme
Court of the United States for a certiorari, which was denied, and on
February 12, 1935, our Supreme Court issued a mandate to be issued.
The bill in the instant case was filed after our Supreme Court had
refused a certiorari in the foregoing case.

The second amended verified bill is a very lengthy one and
takes up forty-two pages of the exhibit. The following are the
material allegations: Complainant alleges that he has been a practicing
lawyer since 1920; that on November 21, 1929, he and defendant
executed the following written agreement:

"Agreement
"This agreement entered into by and between David E. James,
hereinafter designated as first party and Arthur V. Goodel and Edward
J. McDaniel designated as second party, all of the City of
Chicago, Cook County, Illinois;
"Witnesseth:
"Whereas, first party has agreed to sell and deliver unto
the second party all the furniture, personal effects, and other
articles, fixtures, items of personal property and other goods and therein
as hereinafter enumerated, and
"Whereas, second party has agreed to purchase the same at
the price and upon the terms as herein stated,
"The parties, for and in consideration of the sum of \$1.00 (one dollar and no other good and
valuable consideration, the receipt whereof is hereby acknowledged by
each of the parties hereto, and made in the presence of the witnesses
at the residence of the second party, do hereby agree:
"1. First party does hereby agree to and then deliver unto
second party unto second party, at the price of \$1.00 and all
of the following:
"a. Original stock issued and outstanding of the shares of
the Chicago House and Hotel Association, an Illinois corporation,
amounting to \$1000.00.
"b. Property of said association consisting of furniture,
fixtures, personal effects, books, bookshelves, tables, chairs, lamps,
stoves and all other property belonging to said association, in-
cluding all rights, claims and obligations connected therewith to the
association and hotel, and membership applications and payments
received of said furniture and hotel association, except the
following personal effects:
"c. A collection of books of value to said association.
"d. The business of said first party, including everything
that is going forward, including inventory, all accounts receivable
for work performed completed, a copy of which is hereby attached
hereto hereto, and items of value in which first party has an
interest as plaintiff or defendant.

"E. Right to share to the extent of fifty percent of the net profits in Room and Apartment Registry, if, as, and when the same may be organized, and operated by said first party.

"F. All other property of whatever kind and description belonging to said Apartment House and Hotel Association and said David Lipman, incident to or in any way connected with the business of said Association and said law business.

"2. Second party shall pay unto first party the sum of \$1000.00 as earnest money, upon the execution hereof, the receipt whereof is hereby acknowledged, and the balance of \$11,500.00 as follows:

| | |
|-----------|------------------|
| \$2500.00 | December 1, 1929 |
| 500.00 | May 1, 1930 |
| 500.00 | August 1, 1930 |
| 500.00 | November 1, 1930 |
| 500.00 | February 1, 1931 |
| 500.00 | May 1, 1931 |
| 500.00 | August 1, 1931 |
| 500.00 | November 1, 1931 |
| 500.00 | February 1, 1932 |
| 600.00 | May 1, 1932 |
| 600.00 | August 1, 1932 |
| 600.00 | November 1, 1932 |
| 600.00 | February 1, 1933 |
| 650.00 | May 1, 1933 |
| 650.00 | August 1, 1933 |
| 650.00 | November 1, 1933 |
| 650.00 | February 1, 1934 |

"3. The foregoing indebtedness shall be evidenced by sixteen principal promissory notes in the respective amounts and due dates as herein provided, with interest at 6% per annum, after maturity of each of said notes; and it is expressly agreed by the party of the first part that the said notes shall not be negotiated nor discounted, but shall be held by first party until the maturity of the note bearing date of February 1st, 1934, and first party further agrees not to sue upon, or prosecute any suit at law or in equity, upon default in payment of any of said notes conditioned, as aforesaid, until default in payment of note due and payable on February 1st, 1934; provided, however, that in the event second party shall not pay said notes on the respective dates of maturity, first party shall have the right and second party expressly gives first party the right to enter the premises by his agents or attorney, and to examine all books, ledgers and other records in the possession of second party in which any or all accounts received or receivable, or moneys had and received by said second party, by or through the memberships in the Apartment House and Hotel Association, or from the law practice of second party are recorded, and if from such inspection and audit of said records, it appears that the gross monthly income from all sources exceeds the sum of \$650.00, then in that event first party shall have the right to receive forthwith the amounts in excess of the sum of \$650.00 for any calendar month aforesaid, and shall also have the right to sue at law or in equity and prosecute such suit or suits to judgment; and provided, further that notwithstanding anything to the contrary appearing herein, second party shall at no time be excused from making payment of not less than one-fourth of the amount of the respective notes, as the same shall become due from time to time, the balance, if any, to become due and payable cumulatively, on or before February 1, 1934.

"4. It is further mutually understood that in the event the overhead expense of operating the said business, herein sold and transferred by first party to second party, after deducting certain income and rentals received from sub-tenants occupying offices in said suits shall be fixed at the sum of \$400.00, and if said amount

so fixed shall be reduced for any calendar month, then the aforementioned sum of \$650.00 shall likewise be reduced in the same amount and in proportion thereto.

"5. The provisions directly above, being Paragraphs Three and Four hereof, are further conditioned upon, and subject to the payment by second party of all running expenses incident to the operation of said business not more than ten days after the same become due, including such items of expense as rent, cost of publishing and distributing of Apartment House and Hotel Guide, salaries, telephone and any and all expense necessary or incident to the operation of said business.

"6. First party shall remain in said offices and direct the work of said business and instruct the said second party in and about the duties appertaining thereto, and the conduct thereof for a period not less than thirty days, for which the said first party shall be compensated to the extent of seventy-five percent of the net income accruing during said period remaining after deduction of rent, salaries and operating expenses.

"7. Second party shall further agree to publish Apartment House and Hotel Guide bi-monthly, and to distribute the same among members of the Apartment House and Hotel Association, as part of the contract of membership between said members and said Association, and to also carry out and perform said contract of membership in all other respects with each and every member of said association during the period covered by the membership of such members as appears from the records of said association, and to keep and maintain the membership lists, prospect files and other records constantly up to date.

"8. Second party shall and does hereby also agree to prosecute with despatch all of the business relating to the clients of said first party, whether now pending or which may subsequently be handled by said second party, and said first party shall incident to the proper handling of said matters explain the contents of files in said office as the same may be requested by said second party, and further to aid said second party in every way possible upon any matter appertaining to the business of said clients; that upon all pending legal matters and for a period of six months from December 1st, 1929, the letter-heads of said first party and his name shall be used in the conduct of all law business, whether pending in the courts or otherwise, and thereafter substitution of the second party for the first party as attorneys and solicitors shall become effective.

"9. First party shall by his power of attorney duly executed confer upon second party the power and authority to receive and endorse all checks made payable to first party paid on account of outstanding fees due on pending and new law business; and in the event of receipt by second party of any moneys in which first party as set out in Schedule A and other remittances in which first party may have an interest, particularly excluding however, balance of fees due on pending and new law business, said second party shall turn over and deliver such remittances to first party.

"10. Said first party shall aid second party in the publication of said magazine by submission of articles suitable for the use thereof by such publication for the period of one year from December 1st, 1929, and that any announcements in said magazine with reference to the change of the position held by said first party, as general counsel, of said association, shall first be approved by said first party, and it is further understood that second party shall perform no act by reason whereof the name of first party shall be removed from the bulletin board in the lobby of said building and upon the doors of said suite of offices thereof until the unpaid balance has been reduced to twenty-five percent thereof, and in any event shall continue to remain thereon without any change for not

no fixed shall be reduced for any calendar month, from the date
of the first of 1933 shall likewise be reduced in the same
amount and in proportion thereto.

"6. The parties shall, in the event of any dispute, refer the same to a
panel of three persons, one to be named by each party, and the third
to be named by the two named persons. The panel shall have the right to
make a payment by second party of all reasonable expenses incurred
in the operation of said business, including such items of expense as rent, cost of
stationery and distribution of Apartment House and Hotel Guide,
printing, advertising, and all other expenses necessary to the
operation of said business.

"7. First party shall remain in said office and direct
the work of said business and maintain the same until the end of
about the date appearing thereafter, and the contract therefor
a period not less than thirty days, for which the said first party
shall be compensated to the extent of seventy-five percent of the
net income received during said period from the sale of
rent, salaries and operating expenses.

"8. Second party shall further agree to publish Apartment
House and Hotel Guide, and to distribute the same
among members of the Apartment House and Hotel Association, as part
of the contract of membership between said members and said
Association, and to carry out and perform said contract of
membership in all other respects with each and every member of said
Association during the period covered by the contract of said
members as appears from the records of said Association, and to keep
and maintain the membership lists, prospect lists and other records
constantly up to date.

"9. Second party shall and does hereby also agree to
give to with designation all of the business relating to the office
of said first party, whether now pending or to be hereafter
be handled by said second party, and said first party shall transmit
to the proper handling of said matters explain the contents of
files in said office as the same may be requested by said second
party, and further to said second party in every way possible
upon all matters pertaining to the business of said office, that
upon all pending legal matters and for a period of six months from
October 1st, 1933, the latter-mentioned of said first party and his name
shall be used in the conduct of all law business, whether pending or
the course or otherwise, and thereafter substitution of the second
party for the first party as attorneys and solicitors shall become
effective.

"10. First party shall by his power of attorney duly
executed, and in which the power and authority is granted
and contains all things made payable to first party paid on account of
any and all bills due to said first party and his business and in the
event of receipt by second party of any money in which first party
has an interest, shall immediately transmit the same to first party
and on pending and new law business, said second party shall turn
over and deliver such documents to first party.

"11. First party shall and does hereby agree to the
location of said magazine by submission of articles suitable for the
use thereof by such publication for the period of one year from
December 1st, 1933, and that any announcements in said magazine with
reference to the change of the number of the number of said first party, or
any other matter, shall be submitted to first party for his approval
and it is further understood that said first party shall be
removed from the bulletin board in the lobby of said building and
from the front of office thereof until the unpaid
balance has been received in full, and in the
event shall continue to remain thereon without any change for not

less than one year from December 1st, 1929.

"11. This agreement and any interest in and to said property of said association and said first party shall not be assigned, sold, bartered, pledged, transferred, exchanged, or in any way disposed of without the written consent and approval of said first party, so long as the unpaid balance exceeds twenty-five percent thereof.

"12. Said first party does hereby covenant not to enter into any business that may be regarded as competitive to the business conducted by said association for a period of five years and not to engage in the practice of law in the City of Chicago, for the period of three years from the date hereof, except in the Federal Courts and cases where said first party is plaintiff or defendant, nor to make use of the files or records of said association or said law business, that shall or may in any way interfere with the proper conduct of said business, or effect the profits thereof.

"13. To secure the payment of the foregoing balance due under the terms hereof, it is hereby agreed that the said shares of the capital stock of said association, lease to said offices and documents of title appertaining to all of the property herein transferred, sold and delivered shall be deposited in escrow with the directions to such escrowee to deliver the same over unto second party upon the payment of said purchase price, or in the event of default of the terms hereof, then upon notice by first party, specifying such default, said escrowee shall turn over and deliver the same to said first party or his agent.

"In Witness Whereof the parties hereto have hereunto set their hands and seals this 21st day of November, A. D. 1929.

"David Lipman (Seal)

"Arthur V. Goebel (Seal)

"Edward Schatz (Seal)"

The bill then alleges that on February 1, 1930, complainant left said offices and did not thereafter enter into any competitive business with defendants nor engage in the practice of law in Chicago; that his profit from the practice of law and the conduct of said business for five years preceding December 5, 1929, was \$1,000 to \$1,500 a month; that commencing May 12, 1930, the income and profits from said business and practice dwindled until he and said association suffered great losses; that after defendants took over the management of said association and the law business of complainant, by reason of their failure to diligently perform their duties in and about the handling of clients' business, great loss accrued to complainant; that defendants defaulted in the payment of \$500 due May 1, 1930, and complainant made demand for the same, whereupon defendant Goebel made open threats against the life of complainant if the latter dared enter the said offices for an inspection of the business and records; that

from them one year from December 1st, 1933.
"11. This agreement and any interest in and to said
property of said association and said first party shall not be
transferred, sold, assigned, pledged, mortgaged, or in
any way disposed of without the written consent and signature of
said first party, so long as the unpaid balance remains due.
Five percent interest.

"12. Said first party shall have the right to assign or transfer
into and out of said association any or all of its business
and assets and shall be entitled to a share of the profits and
losses of the association in the City of Chicago, for the period
of three years from the date hereof, except in the Federal Courts and
cases where said first party is plaintiff or defendant, and in such
case the time of payment of said association shall be as follows:
That shall be by way of installment with the first payment of
said business, or other the profits of said association.

"13. To secure the payment of the foregoing balance due
under the terms hereof, it is hereby agreed that the said balance of
the unpaid stock of said association, less as said officer and
documentary of said association to all of the property herein stated
to be, said and delivered shall be deposited in escrow with the
depositor to such extent as to deliver the same over and second
party upon the payment of said purchase price, or in the event of
default of the same hereof, then upon notice by first party,
upon giving such notice, said depositor shall turn over and deliver
the same to said first party or his agent.

"14. It is further agreed that the parties hereto have heretofore met
fully and have agreed that the first day of November, A. D. 1933.
"David Hignam (Real)
"Arthur V. Sobel (Real)
"Edward Sobel (Real)"

The bill then alleges that on February 1, 1933, complainant left
said office and did not thereafter enter into any competitive
business with defendant's nor engage in the practice of law in Chicago;
that his profits from the practice of law and the conduct of said
business for five years preceding December 31, 1932, was \$1,000 to
\$1,500 a month; that commencing May 15, 1933, the income and profits
from said business and practice declined until he and said association
suffered great losses; that after defendant's took over the management
of said association and the law business of complainant, by reason of
their failure to diligently perform their duties in and about the
handling of clients' business, great loss accrued to complainant;
that defendant's defaulted in the payment of \$300 due May 1, 1933, and
complainant was forced for the time, thereafter defaulting several times
over losses, against the life of complainant if the latter dared enter
the said office for an inspection of the business and records; that

sometime prior to May 1, 1930, complainant realized that if said business continued to be conducted by defendants in the same manner it would be ruined and all of the moneys invested therein would be lost, and on May 7, 1930, he delivered to defendants a notice in writing which stated that defendants had been guilty of defaults and breaches of the terms of the agreement, and

"You are hereby further notified that the undersigned has elected to treat the withdrawal or attempted withdrawal of said Edward Schatz from active participation in the conduct of said business as an abandonment of the said contract on his part.

"Be hereby further notified and advised that by reason of the foregoing matters in default, each and every one of the foregoing being in violation of the terms of said contract as designated, I hereby demand immediate possession of all the books, records and papers and property and assets of the Apartment House and Hotel Association and said David Lipman, that you surrender up the premises known as Suite 1326-27 and 1329 Burnham Building, 160 North LaSalle Street, Chicago, Illinois, and upon your failure so to do within twenty-four hours from the date hereof, I shall take steps immediately thereafter in respect thereto."

The bill further alleges that the response of defendant Goebel to the notice was that he would wreck and ruin the business before he would pay one dollar to complainant and that he had no intention of doing and performing the matters and things agreed to be done by him under the contract; that on May 12, 1930, complainant entered the premises in question, without force, and assumed the management of the business, in accordance with the terms of the notice, and that "complainant thereafter continued in possession of said premises and management and operation of said business;" that on June 20, 1930, defendants filed an action in trespass against him, in the Superior court of Cook county (Goebel et al. v. Lipman, supra); that upon a trial of that cause a verdict, in favor of defendants, for \$6,000 was returned and judgment was entered upon the verdict; that upon appeal by complainant to this court the judgment was affirmed, upon a remittitur by defendants in the sum of \$3,000; that in due course a capias ad satisfaciendum was served upon complainant; that on May 7, 1932, defendant Goebel filed an action against complainant for personal injuries, which was still pending and undetermined; that defendants have

threatened to process against him and his society in the trespass case and they have already proceeded by way of capias ad satisfaciendum; that when he took back the control and management of said office and business he discovered that defendants had been guilty of certain acts of misconduct in the management of said office and business (enumerating them); that defendants are insolvent; that his claims against defendants (enumerating them) aggregate \$16,513.68; that upon the trial of the cause he should be allowed to set off against the claims and demands of defendants such sums as are equitably and rightfully due him in the premises, and he "believes that upon such hearing hereof, it will be shown that defendants are indebted to complainant in a sum far in excess of the claims of defendants." The bill prays that the court find and determine what sums, if any, are due complainant on account of said contract and the breach thereof by defendants; that defendants be decreed to pay him what, if anything, should appear to be due him; that a temporary injunction issue to restrain and enjoin defendants "from further prosecuting the body execution" in the trespass case. Defendants filed "General and Special Demurrer to Complainant's Second Amended Bill of Complaint," as follows:

"The General and Special Demurrer to the Second Amended Bill of Complaint of David Lipman, complainant. (Here follows the general demurrer.)

"And for further grounds of demurrer, these defendants show to the Court here, the following that is to say:

"(1) Complainant, in his Second Amended Bill of Complaint, alleges matters in Paragraph 15 which are contradictory to matters alleged in Paragraph 14. If one is true, the other is false.

"The matters alleged are contradictory in that complainant in Paragraph 15 admits that judgment was rendered against him in the Superior Court of Cook County and affirmed by the Appellate Court, case No. 35437, on remittitur in the sum of Three Thousand Dollars, in an action of trespass for the malicious, wrongful and unlawful eviction of defendants from the premises known as 1325-27-29 Burnham Building, Chicago, Illinois, and the conversion of defendants' personal property and business on said premises, which was the subject matter of contract set out in Paragraph 2 of said Second Amended Bill of Complaint, and wherein complainant, by absolute contract of sale, sold and delivered everything in and by said contract to the defendants, thus contradicting Paragraph 14 of his Second Amended Bill of Complaint wherein he alleges, contrary to Paragraph 14, that he took possession of said premises and personal property without force.

"(2) Complainant admits that he possessed himself of property belonging to the defendants, and which had heretofore,

[illegible]

according to the terms of said contract set out in Paragraph 2 of complainant's Second Amended Bill of Complaint, belonging to defendants, and that the said taking, as admitted by Paragraph 15, was tortious, having repossessed himself of defendants' property and having retained control of it tortiously. The contract, as far as he is concerned, became void ab initio, and complainant is estopped to proceed thereon in any manner whatsoever.

"(3) It appears from an examination of the contract set out in complainant's Second Amended Bill of Complaint, Paragraph 2, that there is no provision in said contract permitting complainant to repossess the property mentioned in said contract, and complainant admits, in Paragraph 4 of his Second Amended Bill of Complaint, that Paragraph 13 of said contract, being the escrow provision thereof, has been waived, therefore having admitted that he is now in possession of said property and has been since the date of the tortious conversion on May 12, 1930. He does not come into a Court of Equity with clean hands, has no right to maintain his Bill, and the same should be dismissed for want of equity.

"(4) That the allegations of said Second Amended Bill of Complaint as set forth in Paragraph 4 are immaterial; that Paragraphs 21, 22, 23 and 24 are immaterial in that the contract entered into between the complainant and the defendants, and set forth in Paragraph 2 of said Second Amended Bill of Complaint, does not prohibit the defendants from entering into any other line of business. Furthermore, the said contract was an absolute unconditional contract of sale.

"(5) That the provision of said contract as set forth in Paragraph 2 in which the complainant agrees to refrain from the practice of law, is null and void and absolutely contrary to public policy.

"(6) The complainant admits that he took possession of the personal property, premises and business of defendants, and that he has the books and records of the defendants. Therefore, it is wholly within his power to ascertain from the books and records, which he tortiously obtained, the condition of the accounts. Therefore, a Court of Equity has no jurisdiction and the said Second Amended Bill of Complaint should be dismissed for want of equity.

"(7) That the matter of checks alleged to be issued by defendant Arthur V. Goebel are immaterial because the property, business and premises passed to the defendants in and by said contract of sale set forth in Paragraph 2 of said Second Amended Bill of Complaint.

"(8) That the allegations of said Second Amended Bill of Complaint wherein the complainant alleges that after he tortiously took possession on May 12, 1930, he paid obligations of defendants, are immaterial because he was under no obligation under the terms of said contract to pay any of said alleged bills of defendants. Therefore, said allegations are immaterial.

"(9) That as the contract was an absolute contract of sale, the complainant was under no obligation to service members of the Apartment House and Hotel Association, and especially after May 12, 1930, after he had tortiously taken possession of said premises, personal property and business.

"(10) That the allegations in said Second Amended Bill of Complaint with reference to personal loans obtained by Arthur V. Goebel are immaterial, scandalous and impertinent, and have nothing to do with the issues in this case.

"(11) That there are no facts set forth in said Second Amended Bill of Complaint which would constitute insolvency on the part of either of the defendants.

"(12) Complainant admits in and by Paragraph 15 of his said Second Amended Bill of Complaint that a capias ad satisfaciendum issued out of the Superior Court of Cook County, Case No. 518203,

based on said tort judgment for unlawful evicting defendants from the premises mentioned in the contract, Paragraph 2, and for converting their personal property and business to his own use, and that the same was served upon him, and that he was taken into custody under the same, as admitted in Paragraph 18 of said Second Amended Bill of Complaint, and that he put up a bond of Seven Thousand Dollars in the County Court, wherein he filed a petition for discharge under the Insolvent Debtors Act, which is also contrary to the prayer for relief set forth in said Second Amended Bill of Complaint wherein he alleges that he is ready, able and willing to comply with a decree or order of this Court as to what sums, if any, may be found to be due to the defendants. Said allegations oppose each other. Either one or the other must be false - both cannot stand.

"(13) Paragraph 42 of said Second Amended Bill of Complaint is immaterial in that the complainant by his actions in tortiously repossessing all of the personal property, business and premises of the defendants, elected to declare said contract at an end, and having done so, cannot in the same breath consider the contract in full force, nor can he claim any damages thereon because said contract immediately became void at the option of the defendants from the beginning.

"(14) Complainant has an adequate remedy at law, and the mere fact that he may not be able to prove that he has a remedy at law does not mean that he is entitled to a hearing in a court of Equity.

"(15) The damages as alleged by complainant are uncertain, having no foundation in law and are speculative because the complainant could not charge the defendants with loss of profits after he tortiously took possession of the property on May 12, 1930, and furthermore, the Court will not proceed to estimate or guess at the loss of profits when the complainant is attempting to take advantage of his own wrong.

"(16) The complainant does not anywhere in his Second Amended Bill of Complaint allege any facts which show that he is the owner of any of the property or business from which he claims damages.

"(17) The complainant intersperses throughout the Second Amended Bill of Complaint allegations with reference to damage done to Apartment House and Hotel Association. If said Apartment House and Hotel Association has, or claims to have, any interest in said contract, or claims to be the proper party thereto, the complainant, David Lipman, has no right to maintain this action, and the proper party complainant is the Apartment House and Hotel Association, a corporation.

"(18) The complainant admits in Paragraph 15 in said Second Amended Bill of Complaint that he has been convicted of record in the Superior Court, No. 518203, for trespass for unlawful eviction of the defendants from the premises mentioned in the said contract set forth in Paragraph 2, and for the wilful conversion of the personal property and business situated thereon; that the Appellate Court for the First District, Case No. 35437, affirmed said judgment on remittitur; that in and by said admission he also admits that the right to the possession of said property mentioned in said contract, Paragraph 2, is in defendants; that he is in wrongful and tortious possession of the same; that the question of the construction of said contract has been adjudicated, finding the title and possession of the property to be in defendants, and he is attempting to re-litigate in this proceeding what has already been litigated and finally determined by the Appellate Court, Case No. 35437, said judgment having become final when the complainant, after prosecuting his appeal to the Appellate Court, further prosecuted the same to the Supreme Court where a petition for writ of certiorari was denied.

"(19) That this Court of Equity has no jurisdiction to

enjoin the case filed by Arthur V. Goebel in the Circuit Court of Cook County, Case No. B-240852, wherein said Goebel filed his declaration against the complainant herein for damages for an alleged assault committed by the complainant on him. A Court of Equity would have no jurisdiction to try an assault and battery case which is a common law action, nor would it have any power to restrain the prosecution of a tort action, nor has it power to restrain the defendant from prosecuting a capias ad satisfaciendum issued by the Superior Court of Cook County, Case No. 518203, and the only proper tribunal for determining whether or not said capias was properly issued is the County Court of Cook County where an action is pending wherein the complainant is attempting to obtain his liberty under the Insolvent Debtors Act.

"(20) The element of loss of profits was not within the contemplation of the parties at the time the contract was made, because the title passed absolutely to the defendants.

"Wherefore, and for divers other good causes of demurrer appearing in the said Second Amended Bill of Complaint, these defendants demur to said Second Amended Bill, and to all the matters and things therein contained, and pray the judgment of this Honorable Court, whether they shall be compelled to make any further or other answer to the said Second Amended Bill, and they pray to be dismissed with their reasonable costs in this behalf sustained." (Here follows the verification.)

Complainant contends that the bill states a good cause of action and that the "general and special demurrer" should have been overruled. In our judgment the dismissal of the bill may be justified upon a number of grounds. Complainant alleges the proceedings in Goebel et al. v. Lipman, supra, in his bill. It appears from our opinion in that case that it was conceded that clause 13 of the agreement was waived by the parties; that the defendants paid \$1,000 as earnest money and the first payment of \$2,500; that they went into possession of the premises on December 5, 1929, and remained in possession until May 12, 1930; that complainant took possession of the premises, personal property and the business, on May 12, 1930, and that he retained possession thereafter. In our opinion we said:

"The (trial) court asked the defendant to state under what clause of the contract he claimed the right to take possession of the property, to which the defendant answered that he based his right to enter and take possession of the property under clause three of the contract. The court very properly ruled that that clause gave the defendant only the right to enter for the purpose of making an examination or audit of the accounts and that it did not give the defendant the right to enter and take possession of the premises, etc. The court, in passing upon the defendant's motion to direct a verdict at the conclusion of the plaintiffs' case, properly held that if the defendant thought the plaintiffs had breached the contract, he had no right to obtain possession of the premises, etc. * * * At no time during the trial did the defendant assert that the contract was a

conditional sale contract. In this court, however, he contends that 'this agreement amounted to a "conditional sale" and therefore the lease of the premises, the stock and the chattels were the property of the defendant and the Apartment House and Hotel Association until fully paid for,' and that after the plaintiffs had defaulted under the contract he served a notice on them setting up the default and demanding possession of the premises, that the plaintiffs refused to surrender possession and that thereupon the defendant had the right to take possession of the premises, etc. Under the rules we might well disregard the contention now raised in this court that the agreement amounted to a conditional sale contract. The defendant states, in support of the instant contention, that the contract provides only that the defendant 'has agreed to sell and deliver unto the second parties, Goebel and Schatz, his law business,' etc., whereas it provides that the defendant 'does hereby sell, transfer and convey unto said second party, at the price of \$12,500 all of the following,' which are words of present, absolute conveyance."

Later in the opinion we held that the contract "was an absolute contract of sale." We further held that

"The jury were fully warranted in finding that the defendant intentionally and deliberately took the law into his own hands and committed the trespass charged in the declaration. It was an outrageous act and the jury were fully warranted in assessing punitive damages against the defendant."

One of the principles of law that must be applied in determining the question before us is the following:

"A demurrer does not admit allegations of fact which have been previously decided and are res judicata, even though they are alleged contrary to the adjudication. (Martin v. McCall, 247 Ill. 484.) The bill shows clearly that such alleged matters have been previously adjudicated contrary to the contentions of the parties to this bill, and that the other facts stated in this bill contradict such alleged statement of facts." (Leber v. Kemper, 320 Ill. 11, 21.)

From the allegations of the bill and from our aforesaid opinion it appears that complainant based his right to take possession of the premises and property under clause 3 of the contract. That complainant, without warrant under the contract or the law, deliberately, intentionally and illegally repossessed himself of the subject matter of the contract clearly appears from the allegations of the bill and from our aforesaid opinion. That complainant, by his conduct, rescinded and annulled the contract also appears from the allegations of the bill and from our opinion. Complainant concedes, in his reply brief, that after May 12, 1930, "the cancellation and rescission had become effective and complainant was in

possession thereafter." Nevertheless, complainant's bill is based upon the contract, and he seeks therein "to set off against the claims and demands of defendants such sums as he is equitably entitled to and which may be rightfully due him" under the contract. In his bill he seeks to prevent the operation of the capias ad satisfaciendum in Goebel et al. v. Lipman, supra, by asking for an accounting under the contract. This he cannot do. In City of Chicago v. Chicago Ry. Co., 228 Ill. App. 579, decided by this branch of the court, we said (p. 589):

"It is said in 2 Black's Rescission and Cancellation of Contracts, sec. 561, pp. 1321-2: 'A person who is in a position where he can either affirm or rescind a contract cannot do both; he cannot treat the contract as rescinded for the purpose of escaping obligations under it, and at the same time treat it as subsisting for the purpose of claiming benefits, or for any reason treat it as abrogated and as existing at the same time.'"

The decree may also be sustained upon the ground that complainant is guilty of laches, and therefore should be denied injunctive or any other relief. On May 21, 1930, the suit of Goebel et al. v. Lipman, supra, was commenced. Complainant now seeks to have enjoined the judgment entered therein. Our opinion, upon the appeal, was filed February 23, 1932. Certiorari was denied by the Supreme court on June 23, 1932 (see 265 Ill. App. xiv). The original bill in the instant proceeding was filed in the July term, 1932. It appears from the allegations of the second amended bill that complainant could have brought the instant bill at least two and one-quarter years before he did. It also appears from the allegations of the bill, and from our opinion in Goebel et al. v. Lipman that for "sometime prior to May 1, 1930" complainant had knowledge of the alleged facts and circumstances upon which he based his right to take possession. From the time that he took possession he had the custody and control of the books and records. During the two and one-quarter years he allowed defendants to prosecute their suit to a final decision by the Supreme court, and it was in July, 1932, after the issuance of the capias ad satisfaciendum that he, faced with

possession thereof." Nevertheless, complainant's bill is based upon the contract, and he seeks therein "to set off against the claims and demands of defendants such sums as he is lawfully entitled to and which may be rightfully due him" under the contract. In his bill he seeks to prove the operation of the engine of defendant in Goodell et al. v. Ligon, sought by setting for an accounting under the contract. This he cannot do. In City of Chicago v. Chicago Ry. Co., 328 Ill. App. 575, decided by this branch of the court, we said

12. 582

"It is said in a brief of defendant's counsel that the contract is not a contract for the purpose of creating obligations under it, and at the same time it is an obligation for the purpose of creating benefits, or for any reason that it is alleged was an obligation of the contract."

The decree may also be sustained upon the ground that

complainant is guilty of laches, and therefore should be denied

injunctive or any other relief. On May 11, 1930, the bill of Goodell

et al. v. Ligon, sought, was commenced. Complainant now seeks to

have enjoined the judgment entered therein. Our opinion, upon the

appeal, was filed February 20, 1932. Complainant was denied by the

supreme court on June 23, 1932 (see 306 Ill. App. 414). The original

bill in the instant proceeding was filed in the July term, 1932.

It appears from the allegations of the second amended bill that com-

plainant could have brought the instant bill at least two and one-

quarter years before he did. It also appears from the allegations of

the bill, and from our opinion in Goodell et al. v. Ligon that for

"several years prior to May 1, 1930" complainant had knowledge of the

alleged facts and circumstances upon which he based his right to

his possession. From the time that he took possession he had the

entire and control of the books and records. During the two and

one-quarter years he allowed defendants to prosecute their suit to a

final decree by the supreme court, and it was in July, 1932, after

the issuance of the original bill of Goodell et al. v. Ligon, that

imprisonment if he did not pay the judgment, filed the original bill in the instant case. He filed his petition in the County court, under the Insolvent Debtors act (Lipman v. Gasbel et al., 357 Ill. 315), in the fall of 1932, and we must assume, therefore, that he was unable to pay the judgment in the trespass case, and it seems reasonably clear that the instant bill was brought to avoid, if possible, the effect of the capias. In equity a party is not permitted to sleep on his rights to the prejudice of the party on whom he makes a claim; and failure to use reasonable diligence in bringing his suit to enforce a right after the facts in the case are known to a complainant is fatal to his right to recover. Laches is an equitable defense and is allowed to do justice between the parties under all the circumstances of the case without regard to the passage of any definite period of time. The fact that complainant was an experienced lawyer and knew the alleged facts upon which he bases his right to an accounting "sometime prior to May 1, 1930," must be considered in determining the question of laches.

The decree may also be sustained upon the ground that complainant comes into a court of equity with unclean hands. What we have heretofore said in this opinion sufficiently shows our reasons for thus concluding. While this rule of equity, which forbids relief to him who is guilty of inequitable conduct, applies only where the improper conduct concerns the very transaction of which complaint is made, it is clear that the improper conduct of complainant was directly connected with the subject matter of the instant litigation. Complainant's sole defense in the trespass case was based upon the contract. Equity will not aid one who unlawfully and maliciously takes the law into his own hands and then seeks to obtain relief in chancery from the consequences of his conduct. This rule is especially applicable to the conduct of complainant, an experienced lawyer familiar with the facts. Complainant contends that the defense of unclean hands cannot

impracticable for him to pay the judgment, filed the original bill in the Federal court. He filed his petition in the Federal court under the Insolvency Act (*Wright v. Wright*, 100 F. 2d 111, 115), in the fall of 1933, and we must assume, therefore, that he was unable to pay the judgment in the Federal court, and it seems reasonably clear that the Federal bill was brought to avoid, if possible, the effect of the equity. In equity a party is not permitted to sleep on his rights to the prejudice of the party on whom he makes a claim; and failure to use reasonable diligence in bringing his suit to enforce a right after the facts in the case are known to a complainant is fatal to his right to recover. Indeed in an equitable defense and is allowed to be taken between the parties with all the circumstances of the case without regard to the passage of any definite period of time. The fact that complainant was an experienced lawyer and knew the alleged facts upon which he based his right to an account is "sometime prior to May 1, 1930," must be considered in determining the question of laches.

The defense may also be sustained upon the ground that complainant comes into a court of equity with unclean hands. That we have heretofore said in this opinion sufficiently shows our reasons for this conclusion. "If this rule of equity, which English courts in this case is fairly of inequitable conduct, applied only to the improper conduct concerning the very transaction of which complaint is made, it is clear that the improper conduct of complainant was directly connected with the subject matter of the Federal litigation. Complainant's sole defense in the Federal case was based upon the conduct. Equity will not aid one who unlawfully and maliciously takes the law into his own hands and then seeks to obtain relief in equity from the consequences of his conduct. This rule is especially applicable to the conduct of complainant, an experienced lawyer familiar with the facts. Complainant contends that the defense of unclean hands cannot

be raised by demurrer, and cites in support of this contention Pinkoff v. Ryland, 272 Ill. App. 280. That case (p. 286) cites the rule of equity which forbids relief to him who is guilty of inequitable conduct and holds that it applies only where the improper conduct concerns the very transaction of which complaint is made; that the allegations of the bill in that case did not call for the application of the rule, and that if the defense existed it could be properly raised by answer. If want of jurisdiction, the bar of the statute of limitations, the statute of frauds, laches, unclean hands, multifariousness, or defenses of a kindred character appear on the face of a bill, it will be obnoxious to a demurrer unless an equitable excuse is alleged in the bill that avoids the operation of the rule.

Other grounds are urged by defendants in support of the decree, but in our view of this appeal it is not necessary to pass upon the same. There is, of course, no merit in complainant's contention that as the chancellor dismissed the bill upon the sole ground that complainant came into court with unclean hands, other grounds urged by defendants in support of the decree should not be considered.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan, J., concurs.

As Mr. Chief Justice Friend was the chancellor in the trial of this cause, he took no part, in this court, in the consideration ~~of~~ nor determination of this appeal.

the bill in support of this contention
be raised by defendant, and then in support of this contention
Timothy v. Wyland, 275 Ill. App. 280. That case (p. 280) also
the rule of equity which forbids relief to him who is guilty of
negligent conduct and holds that it applies only where the improper
conduct concerns the very transaction of which complaint is made;
that the allegations of the bill in that case did not call for the
application of the rule, and that if the balance equaled it could be
properly raised by answer. It went on to hold that, the bar of the
equity of litigation, the statute of frauds, usury, and other
unliquidated, or defense of a kindred character appear on the
face of a bill, it will be considered a defense unless an equitable
amount is alleged in the bill that avoids the operation of the rule.
Other grounds are urged by defendant in support of the
decree, but in our view of this appeal it is not necessary to pass
upon the same. There is, of course, no merit in complainant's con-
tention that as the Statute of Frauds for all upon the facts stated
that complaint was not well advised, that ground
urged by defendant in support of the decree should not be considered.
The decree of the Circuit Court of Cook County is affirmed.

37589

RAYMOND E. BLACKWOOD,
Appellant,

v.

FREDERICK H. FROMKE,
Appellee.

94 H
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

279 I.A. 634¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in an action of trespass on the case. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of one dollar. The jury answered two special interrogatories submitted to them, as follows: (1) that defendant was not actuated by malice toward plaintiff in securing his arrest, as alleged in the declaration; and (2) that he was actuated by malice toward the plaintiff in the bringing of the criminal prosecution, as alleged in plaintiff's declaration. Defendant made no motion for a new trial. Plaintiff's motion for a new trial was overruled and he has appealed from a judgment entered upon the verdict.

The first count of the declaration charges, inter alia, that on June 18, 1929, defendant falsely, maliciously, and without any reasonable or probable cause charged that plaintiff had robbed defendant with a gun; that defendant falsely, maliciously and without any reasonable or probable cause procured the arrest of plaintiff and caused the latter to be brought before one of the judges of the Municipal court of Chicago "to be dealt with according to law for the supposed offense," and that defendant, on said date, wrongfully and unjustly, and without any reasonable or probable cause whatsoever procured plaintiff to be arrested and to be imprisoned and kept in

KATHLEEN M. BLACKBURN,
Appellant.

v.

WILLIAM M. BROWN,
Appellee.

MR. JUSTICE SWANSON DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in an action of trespass on the case. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of one dollar. The jury awarded for special damages nothing as there was nothing in the evidence to show that defendant was not notified by notice served plaintiff in accordance with the summons, as alleged in the declaration; and (2) that he was notified by notice served the plaintiff in the bringing of the original proceedings, as alleged in plaintiff's declaration. Defendant made no motion for a new trial. Plaintiff's motion for a new trial was overruled and he has appealed from a judgment entered upon the verdict.

The first count of the declaration charges, inter alia, that on June 12, 1937, defendant unlawfully, maliciously, and against any reasonable or probable cause charged that plaintiff had robbed defendant with a gun and defendant unlawfully, maliciously and without any reasonable or probable cause procured the arrest of plaintiff and caused him to be brought before one of the judges of the Municipal Court of Chicago "to be held with according to law for the purpose of return," and that defendant, on said date, unlawfully and maliciously, and without any reasonable or probable cause threatened plaintiff to be arrested and to be imprisoned and kept in

prison for the space of twelve hours; that on June 28, 1929, defendant falsely, maliciously and without any reasonable or probable cause procured plaintiff to be examined before said judge touching the said supposed offense and that said judge, having heard and considered the case, adjudged and determined that plaintiff was not guilty of the said supposed offense and then and there acquitted and discharged plaintiff, and that defendant has not further prosecuted his complaint and has abandoned the same, and the said complaint and prosecution are wholly ended and determined. Count two alleges malicious prosecution. Counts three and four allege slander. Counts five and six allege false imprisonment. Defendant filed the plea of the general issue; also special pleas as to counts three and four alleging, in substance, that the alleged slanderous words were spoken in the honest belief that plaintiff was the person who had robbed defendant and were "spoken solely to said police officer for the purpose of bringing to justice an individual whom he believed guilty of the crime of highway robbery;" also special pleas as to counts one, two, five and six, which allege, in substance, that prior to the signing of the complaint defendant was robbed by an individual armed with a revolver, that said individual was identical in appearance with plaintiff, that at the time he signed the complaint and made the charge he honestly believed that plaintiff was the individual who had robbed him, and that in making the charge he was not actuated by malice nor ill will toward plaintiff.

There is little dispute as to the main facts. Plaintiff, at the time in question, was about fifty years old. He was born in Iowa and had taught school to obtain a college education. After leaving college he did newspaper work in that state. In August, 1907, he came to Chicago, where he worked for the City Press Association for more than a year. He then worked for the Civil Service Association

prison for the space of twelve hours; that on June 12, 1907, defendant
and I, jointly, separately and without any reasonable or probable
cause procured plaintiff to be examined before said judge touching
the said supposed offense and that said judge, having heard and con-
sidered the case, adjudged and determined that plaintiff was not
guilty of the said supposed offense and then and there acquitted and
discharged plaintiff, and that defendant has not further prosecuted
his complaint and has abandoned the same, and the said complaint and
prosecution are hereby void and annulled, shall the above
relatives prosecute. Wherefore I and my legal counsel, heirs
five and six allege false imprisonment. Defendant filed the plea of
the general issue; also special pleas as to counts three and four
alleging, in substance, that the alleged kidnappers were without
in the honest belief that plaintiff was the person who had robbed
defendant and were "spoken solely to said police officer for the pur-
pose of bringing to justice an individual whom he believed guilty of
the crime of highway robbery" also special pleas as to counts one,
two, three and six, which allege, in substance, that prior to the signing
of the complaint defendant was robbed by an individual armed with a
revolver, that said individual was identical in appearance with plain-
tiff, that at the time he signed the complaint and made the charge
he honestly believed that plaintiff was the individual who had robbed
him, and that in making the charge he was not actuated by malice nor
ill will toward plaintiff.
There is little dispute as to the main facts. Plaintiff,
at the time in question, was about fifty years old. He was born in
Iowa and had sought school to obtain a college education. After
leaving college he did newspaper work in that state. In August, 1907,
he came to Chicago, where he worked for the city news publisher
the next day a party in whom plaintiff

for eight or nine years. He began the practice of law in December, 1922. In March, 1929, he was appointed an assistant state's attorney of Cook county by state's attorney John A. Swanson. Plaintiff's duties related to "tax fixing" cases and his work was done in the County building, in which the state's attorney had an office. On June 18, 1929, he kept an appointment with Judge Horner, Probate judge of Cook county, after which, in pursuance of ^{his} duties, he went to the assessor's office, located in the same building, and after completing his work there he went to the eighth floor of the City Hall, which is connected with the County building, to check up certain cases that he was attending to in the Municipal court. He left there and was standing in the hallway on that floor waiting for an elevator, when defendant suddenly appeared with a policeman and ~~XXXXXX~~ said to the latter: "Arrest this man. He held me up in my real estate office three months ago." Plaintiff said to the policeman, "Why, he is crazy, I am a lawyer," and handed the policeman his card and requested permission to telephone his office. Neither defendant nor the police officer had a warrant for plaintiff's arrest. The officer refused to allow plaintiff to telephone and said that he would "have to come along." The officer took plaintiff by the arm and led him to the Central Detail police station, at Madison and Market streets. Plaintiff there asked leave to telephone, and stated that he was an assistant state's attorney. He was not permitted to telephone, was handcuffed, placed in a patrol wagon, and driven to the Chicago Lawn station at 3515 West 63rd street, Chicago. Defendant accompanied plaintiff and the officer during all of this time. At the last station plaintiff said to the lieutenant of police stationed there: "I would like to telephone. This thing has gone far enough. If you will let me call up Judge Matchett or Judge Johnson or Judge Trude, or John Swanson, the state's attorney, or if you will call them up yourself, you will find out

for eight or nine years. He began the practice of law in December, 1911. In March, 1917, he was appointed as assistant state's attorney at Cook county by order of Governor Deneen. He remained in that position until his appointment as state's attorney for Cook county in June 1918, 1919, he kept an appointment with Judge Bennett, trustee of Cook county, after which, in pursuance of his appointment, he went to the successor's office, located in the same building, and after completing his work there he went to the state house at the city hall, which is connected with the county building, to check up certain cases that he was attending to in the municipal courts. He left there and was standing in the hallway on that floor waiting for an elevator, when suddenly a woman appeared with a package and ~~XXXXXX~~ said to the latter: "Arrest this man. He held me up in my coat while other women were in the room." Plaintiff said to the defendant: "Why, he is simply a man in a jacket," and looked the package over. She said she recognized the package as belonging to him. Plaintiff defendant was the man who was arrested for ~~XXXXXX~~ and was taken to the police station. The witness refused to allow plaintiff to be taken to the station and said she would go with him. The witness took plaintiff by the arm and led him to the Central Postal Police station at Madison and Market streets. Plaintiff there called leave to telephone and stated that he was an assistant state's attorney. He was not permitted to telephone, was handcuffed, placed in a patrol wagon, and taken to the Chicago News station at 2311 West 62nd street, Chicago. Plaintiff accompanied plaintiff and the officer during all of this time. At the last station plaintiff said to the assistant of Police station there: "I would like to telephone. This thing has gone far enough. If you will let me call up Judge Bennett or Judge Leland or Judge Taylor, or any one of the judges, you will find out otherwise, or if you will call them up yourself, you will find out

this is just a joke. You will find out who I am. I am an Assistant State's Attorney. I don't see why you should deny me the right to telephone to somebody." Defendant then said: "I am a responsible citizen. I am worth upwards of two hundred thousand dollars. I am ready to sign a complaint," and plaintiff was not allowed to telephone. From that station plaintiff, handcuffed, was taken in a patrol wagon to the Bureau of Identification at 11th and State streets, defendant also riding in the wagon. At the Bureau plaintiff was photographed, "fingerprinted," weighed and measured. He was then returned, in the patrol wagon, to the Chicago Loop station and placed in a cell, where many policemen and "other people" inspected him. About five o'clock in the afternoon he was "lined up" in the station with six or seven other men and asked his name and occupation in the presence of defendant and others who had been brought to the station for the purpose of determining if he was one of the participants in the robbery in question. Finally, at nine p.m., plaintiff was permitted to telephone his wife. About ten o'clock that evening he was taken by the police to the home of Judge Matchett, who released him upon his own recognizance. The next day defendant signed a complaint against plaintiff before Judge Jonas, a judge of the Municipal court of Chicago. The complaint charged that plaintiff, on April 5, 1929, "feloniously and violently did make an assault and did then and there put the said Frederick Froemke in bodily fear and danger of his life, and did take one white gold diamond ring 1 7/8 carat blue white stone set in platinum valued at \$1900 and \$300 in U. S. Currency the personal goods and property of the said Frederick Froemke from the person and against the will of the said Frederick Froemke then and there, feloniously and violently by force and intimidation, did rob, steal, take and carry away; and the said Raymond Blackwood then and there was armed with a certain dangerous weapon, to-wit: a blue steel revolver with the unlawful

this is just a joke. You will find out the I am an
American citizen. I don't care how you would like to
the right to citizenship is everybody. I am an American citizen. I am
a responsible citizen. I am worth respect of the American people
believe. I am ready to sign a complaint, and I believe you are
allowed to do so. You have a right to do so. I believe
was taken in a patrol wagon to the Bureau of Investigation. I believe
and State streets, defendant also riding in the wagon. I believe
Bureau of Investigation. I believe you are a responsible citizen.
respected. He was then taken to the patrol wagon, to the Chicago
last night and placed in a cell, where many policemen and "other
people" inspected him. About five o'clock in the afternoon he was
"lined up" in the station with six or seven other men and asked his
name and occupation in the presence of defendant and others who had
been brought to the station for the purpose of determining if he was
one of the participants in the robbery in question. Finally, at
nine p.m., plaintiff was permitted to telephone his wife. About ten
o'clock that evening he was taken by the police to the home of Judge
Schmidt, who released him upon his own recognizance. The next day
defendant signed a complaint against plaintiff before Judge Jones,
a judge of the Municipal Court of Chicago. The complaint charges
that plaintiff, on April 8, 1933, "deliberately and violently did make
an assault and did then and there put the said Frederick Brown in
bodily fear and danger of his life, and did take and white said dis-
soning 1 1/2 cents. This white alone set in plaintiff's value at
\$1000 and \$500 in C. A. Germany the personal goods and property of
the said Frederick Brown from the prison and against the will of
the said Frederick Brown and there, deliberately and violently
by force and intimidation, did rob, steal, take and carry away, and
the said Frederick Brown and there was armed with a certain
dangerous weapon, to-wit: a blue steel revolver with the number

and felonious intent then and there if resisted, to kill and maim the said Frederick Troomke in the said robbery * * * contrary to the statute," etc.

It is unnecessary to state the circumstances surrounding the alleged robbery for the reason that defendant's counsel, in the trial of the case, stated that "the defendant had made an honest mistake in identifying the plaintiff as one of the robbers, and that the acts of the defendant in causing the plaintiff's arrest were not malicious; that the whole situation was the result of the perfect likeness the plaintiff bore to one of the robbers in the above mentioned holdup," and in his opening statement to the jury the same counsel stated "that not one word would be said against the reputation of the plaintiff nor any attempt made to establish the fact that he was one of the parties that robbed the defendant in his office and that plaintiff's general reputation had been and was good."

Plaintiff contends that, under the facts of the case, the damages assessed by the jury are grossly inadequate, and that "improper and prejudicial remarks and misconduct of attorney for defendant in the presence of the jury," were responsible for the verdict. Plaintiff calls attention to the fact that while the jury found, in its answer to special interrogatory one, that defendant was not actuated by malice toward the plaintiff in securing his arrest, that in its answer to special interrogatory two it found that "defendant was actuated by malice toward the plaintiff in the bringing of the criminal prosecution, as alleged in plaintiff's declaration." Defendant states, in his brief, that "the fact that the plaintiff only secured a verdict for \$1.00 is due to the fact that the jury must have believed that the defendant in the case received a great deal more punishment, abuse and lack of consideration than the plaintiff received when he was arrested." The record discloses that counsel for defendant secured the verdict by claiming that defendant, after the arrest of plain^{if},

and testimony which was given in regard to the fact that the defendant was not present at the time of the shooting, and that the defendant was not present at the time of the shooting, etc.

It is unnecessary to state the circumstances surrounding the alleged robbery for the reason that the defendant's account in the trial of the case, stated that "the defendant was with an honest

mistake in identifying the plaintiff as one of the robbers, and that the state of the defendant in making the plaintiff's arrest was not malicious; that the whole situation was the result of the honest

mistake of the plaintiff here to one of the robbers in the above mentioned robbery," and in his opening statement to the jury the same

was stated that "that not one word would be said against the reputation of the plaintiff nor any attempt made to establish the fact that he

was one of the robbers that robbed the defendant in his office and that plaintiff's general reputation had been and was good."

The plaintiff contends that, when the facts of the case, the charges made by the jury are grossly inaccurate, and that "improper and prejudicial remarks and misstatements of attorney for defendant in the

presence of the jury," were responsible for the verdict. The plaintiff calls attention to the fact that while the jury found in its verdict that the defendant was not released by any

special interrogatory one, that defendant was not released by any other special interrogatory one in finding the verdict, that in the answer to

special interrogatory two it found that "defendant was released by the plaintiff in finding the verdict, that in the answer to

special interrogatory two it found that "defendant was released by the plaintiff in finding the verdict, that in the answer to

had been "harassed" and "bulldozed" in the state's attorney office, and by arguing to the jury that he thought it would be a good thing for the jury to give the state's attorney's office "a dose of their own medicine" by denying the claim of plaintiff, an assistant state's attorney. We have seldom, if ever, seen a record that contained so many improper and prejudicial remarks and statements as we find in the instant one. It would unduly lengthen this opinion to refer to all of them, but we shall cite certain of the major ones. Defendant, on direct examination, testified that after the arrest of plaintiff the assistant state's attorneys who investigated the case "grilled" defendant for about four hours. Plaintiff's counsel, on cross-examination, repeatedly attempted to question defendant in reference to the alleged grilling, but the trial court, upon objection by defendant, refused to allow plaintiff to do so. It was upon this testimony of defendant that his counsel based his main defense. That the state's attorney had the power and right to inquire into the alleged robbery is clear. In addition to the fact that it was his duty to inquire into all charges of that character he was vitally interested in ascertaining if one of his assistants had been guilty of the serious charge made against him. If assistant state's attorney Worthup unduly "grilled" defendant or "bulldozed" him, as counsel for defendant told the jury, that fact could not be made the basis of a defense to the instant action. And yet counsel for defendant made the following statement to the jury in his argument: "These men are in the State's Attorney's office. You know how things are. A man may be picked up and locked up two or three days, not tell anybody. That's all right. The State's Attorney's office does it. But let one of them get picked up, and then the Star Spangled Banner is waved, is torn to shreds. I sometimes wonder, maybe it is good for them to get a dose of their own medicine, and realize people ought not to be taken. We have seen so much of that under this present administration." When objection to this statement was sustained, counsel immediately

[illegible]

stated to the jury: "I am just talking to you as man to man, and bringing out the inside dope." Counsel for defendant now frankly states, in defendant's brief, that the jury in rendering its verdict adopted this suggestion. Counsel also made the following statement to the jury: "Mr. Worthup (assistant state's attorney), big, heavy Worthup, known from the time of Charley Bensen down as the biggest bulldozer for looking people up without warrant. Mr. Brown (attorney for plaintiff): I object to reviling an honest man. No evidence in here. Mr. Reniff (attorney for defendant): The whole Bensen crowd is in it. I ain't finding any fault with them. The Court: Objection sustained. Confine yourself. Mr. Reniff: You have seen the crowd here, and you folks who have lived here like I have for a good many years, you take the crowd - Judge Hatchett from the Seventh District, on the South side, Johnnie Worthup, down on the other side. You take Paul Wittenhouse, right down the middle, farther in the other end of the district. Take them all along there. You get Russell Whitman on the Civil Service Commission, and Morton D. Hull, in the other crowd, and Cornwell - all along the line. All right, don't ever do like Froemke did, no matter who you think robbed you. Go out and look him up, and find out if he is an assistant State's attorney in the administration in office. If you don't, get ready for a vacation." Counsel repeatedly made statements to the effect that plaintiff was a member of the "Bensen Organization." Mr. Bensen was not a witness and there is nothing in the evidence to connect him with the case. Although defendant conceded the good reputation of plaintiff, nevertheless, distinguished judges and citizens who merely testified that plaintiff's reputation was good were characterized by the counsel as members of the Bensen crowd, who were seeking to aid plaintiff for political reasons. During the cross-examination of defendant the trial court ruled that defendant should answer a certain question, whereupon defendant's counsel stated: "Object to that, if the court

...to the jury: "I am just telling you as you are men, and
...in defendant's belief, that the jury in reaching the verdict
...this suggestion. I want this case the fullest attention
...the jury. The hearing defendant state's attorney, Mr. ...
...known from the time of thirty women down on the highest
...the ... of ...
...I object to reviling an honest man. No evidence in
...the ...
...is in it. I ain't standing any kind with them. The ...
...the ...
...and you folks who have lived like I have for a good many
...you take the crowd - Judge ...
...on the south side, ...
...that ...
...the ...
...on the Civil Service Commission, and ...
...and ...
...like ...
...and find out if he is an ...
...the ...
...and there is nothing in the evidence to connect him with the case.
...the ...
...the ...
...the ...
...the ...
...the ...

please, * * * because a man brings a case against a politician it looks as though he might as well throw himself out." Further on in the same cross-examination defendant's counsel interjected, "File a charge, and that's what he gets." Although defendant's counsel conceded "that defendant had made an honest mistake in identifying plaintiff as one of the robbers," still, in addressing the jury, counsel for defendant stated "the whole Hansen faction" was present at the trial of the criminal charge before Judge Jonas, and, by innuendo, suggested to the jury that politics played a part in the decision. He mentioned Judge Jonas as a member of the "Democratic organization," although there is nothing in the evidence upon which to base such a statement. He told the jury that "the defendant at the table is just the same as you are, a citizen without having any political environment of any kind or nature."

It is true that the trial court sustained objections to the statements of counsel, but merely sustaining the objections and instructing the jury to disregard the statements was not a sufficient remedy for the wrong done. When it became apparent that the counsel was persisting in the improper statements and arguments the trial court should have sternly rebuked him, and when that course failed should have punished counsel for his deliberate misconduct.

It is not necessary, in our judgment, to pass upon other contentions raised by plaintiff.

As to whether defendant acted maliciously and without probable cause, it is sufficient to say that plaintiff made out a prima facie case in that regard, but we do not deem it necessary to cite the circumstances that bear upon that branch of the case.

Plaintiff has not had a fair trial and the judgment of the Circuit court of Cook ^{county} is reversed and the cause is remanded.

REVERSED AND REMANDED.

Friend, P. J., and Sullivan, J., concur.

37641

AETNA ACCEPTANCE COMPANY,
a Corporation,
Plaintiff in Error,

v.

GEORGE M. ROZCZNIALSKI,
Defendant in Error.

95-7
ERROR TO MUNICIPAL
COURT OF CHICAGO.

279 I.A. 634²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by plaintiff to review an order of the Municipal court of Chicago "expunging" a judgment previously entered in plaintiff's behalf.

The suit was commenced in replevin for the possession of a Packard sedan automobile. The replevin writ was served on defendant on February 26, 1932, at which time the bailiff of the Municipal court made a demand for the possession of the automobile, but defendant refused to comply with the demand. On May 11, 1932, a notice was mailed to defendant informing him that on May 13, 1932, plaintiff would appear in court and ask leave to file a statement of claim in trover instantor and would move for a rule on defendant to file his affidavit of merits thereto within five days thereafter. On May 13, 1932, the trial court entered an order granting plaintiff leave to file such statement instantor and ruling defendant to file his affidavit of merits to the same in five days. Thereupon plaintiff filed the following verified statement of claim:

"Plaintiff alleges that on, to-wit: the date of the service of the replevin writ herein upon the defendant, George M. Rozcznialski, said defendant then and there in the City of Chicago, wilfully, wrongfully, tortiously and maliciously converted and disposed of the goods and chattels of the plaintiff, which are more particularly described as follows, to-wit:

One (1) 1930 Packard Sedan,
Serial #182917, Motor #183064.

Plaintiff further alleges that demand was made upon said defendant,

AMERICAN ASSURANCE COMPANY,
a corporation,
Plaintiff in Error,

vs.

JOHN M. HENNINGSEN,
Defendant in Error.

279 I.A. 634

THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

This writ of error is now out by plaintiff to review an order of the Municipal Court of Chicago "expunging" a judgment previously entered in plaintiff's behalf.

The writ was commenced in reply to the possession of a Packard sedan automobile. The relevant writ was served on defendant on February 22, 1925, at which time the plaintiff of the Municipal Court made a demand for the possession of the automobile, but defendant refused to comply with the demand. On May 12, 1925, a notice was mailed to defendant informing him that on May 12, 1925, plaintiff would appear in court and ask leave to file a judgment of claim in trover instance and would move for a rule on defendant to file his affidavit of merit therein within five days thereafter. On May 12, 1925, the trial court entered an order granting plaintiff leave to file such statement and judgment and ruling defendant to file his affidavit of merit by the same day. Defendant's affidavit of merit was filed following receipt of judgment at which time the following verdict was returned at which

"Plaintiff alleges that on, to-wit: the sum of ten dollars and no cents of the plaintiff was paid to the defendant, Henry A. Henningsen, and defendant then and there in the City of Chicago, Illinois, wrongfully, tortiously and maliciously converted and dissipated the goods and chattels of the plaintiff, to-wit: the automobile described as follows, to-wit:
One (1) 1920 Packard Sedan,
Serial 12345, Motor 67890.
Plaintiff further alleges that damage was made upon said automobile,

for the return of said property but said defendant, notwithstanding said demand, on, to-wit, on the day aforesaid, wilfully, wrongfully, tortiously and maliciously converted and disposed of said goods and chattels to his own use.

"To the damage of the plaintiff for the value of said property so converted, amounting to the sum of, to-wit: One Thousand Dollars (\$1,000.00) together with legal interest thereon from the date of said conversion as well as other damages sustained by said plaintiff, by reason of said conversion, and therefore it brings its suit, etc.

"WILLIAM S. KLEINMAN

Attorney for Plaintiff."

The record discloses that no affidavit of merits was filed by defendant. On October 15, 1932, a notice was served upon defendant notifying him that on October 18, 1932, plaintiff would appear in court and move for a judgment in accordance with plaintiff's statement of claim. On the last mentioned date, upon motion of plaintiff, the trial court entered said motion and postponed action on the same until November 3, 1932. On October 25, 1932, defendant was served with a written notice of the order entered by the trial court on October 18, 1932, and a notification that on November 3, 1932, plaintiff would renew its motion for the entry of a judgment in trover against defendant. On November 3, 1932, the trial court entered the following order:

"This cause coming on for hearing upon the motion of the plaintiff heretofore entered herein for judgment in trover, and the Court being fully advised in the premises sustains said motion, and thereupon enters the following finding, to-wit:-

"The Court finds the defendant, G. M. Rozczynalski guilty of conversion of property described in plaintiff's statement of claim and assesses the damages in the sum of Five Hundred Fifty and No/100 Dollars (\$550.00) and costs in trover."

"This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment in trover on the finding herein, and that the plaintiff have and recover of and from the defendant, G. M. Rozczynalski, the damages of the plaintiff amounting to the sum of Five Hundred Fifty and No/100 Dollars (\$550.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor."

On December 13, 1932, which was more than thirty days after the judgment was entered, defendant filed the following verified "petition:"

"Comes now, George M. Rozczynalski, made one of the defendants in the above entitled cause, as petitioner, and presents his petition against Aetna Acceptance Company, a corporation, as respondent, and he thereupon states and charges the following matters and things:

[illegible]

plaintiff, by reason of said conversion, and therefore is prima facie entitled to recover the value of said property as converted, and the amount of said conversion is prima facie the measure of the plaintiff's damages. The defendant's defense is that the property was not converted, and that the plaintiff is not entitled to recover the value of said property as converted, and the amount of said conversion is prima facie the measure of the plaintiff's damages. The defendant's defense is that the property was not converted, and that the plaintiff is not entitled to recover the value of said property as converted, and the amount of said conversion is prima facie the measure of the plaintiff's damages.

RECEIVED 10 JUL 1964
TELETYPE NOT RECORDED

The record discloses that no affidavit of service was filed by defendant. On October 18, 1932, a notice was served upon defendant notifying him that on October 18, 1932, plaintiff would appear in court and move for a judgment in accordance with plaintiff's statement of claim. On the last mentioned date, upon motion of plaintiff, the trial court entered said motion and granted relief on the same until November 2, 1932. On October 22, 1932, defendant was served with a written notice of the order entered by the trial court on October 18, 1932, and a notification that on November 2, 1932, plaintiff would remove the motion for the entry of a judgment in favor against defendant.

1. The first group of people who were involved in the development of the program were the students of the University of California, Berkeley, who were interested in the study of the effects of the program on the students of the University of California, Berkeley.

10-10-1947

-acting as a defense attorney to his clients

1971

in the year 1843 and 1844

1. David M. Jones (18.0323)

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

is contained by the point set $\{x \in X : x \text{ is a limit point of } A\}$.

It was found that the following factors were associated with the presence of the virus in the blood of the patients:

It is not possible to determine the exact date of the first publication of the book, but it is known that it was published in the early 19th century.

1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 23

... ..

1. *Journal of the American Medical Association*, 1990; 263: 1000-1001.

THE UNIVERSITY OF CHICAGO

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It will be seen, therefore, that the

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 14th day of June, 1964.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

"I.

"That by reference thereto (with leave to attach copies thereof to this petition if necessary) he makes the several papers filed under the above number, with endorsements thereon, and the entries appearing upon the half-sheet and in docket 2701 Replevin, under the above title and number, a part of this petition for greater certainty.

"II.

"That the foregoing papers, the entries on the half-sheet and appearing upon the docket above described constitute the whole of the written record of proceedings had and taken in the above entitled cause, and that there is no other record book containing any record of such proceeding in the possession of the Clerk of this Court to which reference need be made for greater certainty.

"III.

"That from such record, it will appear that the paper styled 'Amended Statement of Claim' was filed by leave of court instant, and that no copy thereof, or any summons thereon has ever been served upon this petitioner, and no notice was given to him of any intention to secure a judgment upon which an execution for the body could issue.

"IV.

"That the record of these proceedings is not sufficient to sustain a capias writ issued in the above entitled cause, and that no other process has ever been issued herein of which this affiant has any knowledge of notice, and therefore the execution or capias writ should be quashed.

"V.

"That an order should be entered herein directing the Clerk to record a proper judgment if the court is of the opinion that one should be now recorded; or in the alternative an order should be entered herein quashing or expunging the purported record of judgment, and the defendant should be allowed to plead a defense on the merits within such time as the court may order, to the end that justice may be done.

"The foregoing matters considered, the petitioner prays that an order may be entered herein as prayed for above, or that a hearing may be had on this petition to the end, that petitioner may be able to prove the matters and things herein stated, and that all other orders may be entered herein.

"George M. Rozczynialski"

Plaintiff moved the court to strike the said petition from the files upon the ground that it did not contain any affirmative matters which would entitle defendant to the relief asked. It appears from the bill of exceptions that counsel for defendant resisted plaintiff's motion to strike upon the ground that defendant was entitled to the relief sought for the reason that the record showed that plaintiff's statement of claim in trover did not allege "that the plaintiff casually lost the goods and chattels described in the said statement of claim in trover and that the said goods and chattels of the plaintiff came to the possession of the defendant by finding." The trial court sus-

tained defendant's position and denied plaintiff's motion to strike upon the sole ground that the said statement of claim did not allege "that the plaintiff casually lost the goods and chattels described in the said statement of claim in trover and that the said goods and chattels of the plaintiff came to the possession of the defendant by finding." Thereupon the trial court, upon motion of defendant, struck from the files the statement of claim and in the order recited that the statement of claim was stricken from the files for the reason heretofore stated. Defendant then moved the court to "expunge" from the record the judgment in trover entered on November 3, 1932, which motion was sustained by the court and an order was entered expunging from the record the said judgment "for the reason that the statement of claim in trover filed herein on May 13th, 1932, is not a proper statement of claim in an action in trover for conversion, because the said statement of claim in trover does not allege 'that the plaintiff casually lost the goods and chattels described in the said statement of claim in trover and that the said goods and chattels of the plaintiff came to the possession of the defendant by finding.' * * * Whereupon, the defendant, by his attorney, then moved the court to quash the copias ad satisfaciendum, heretofore issued under said judgment in trover, which said motion the court then and there sustained and ordered the said copias ad satisfaciendum to be quashed." Defendant has not seen fit to defend the record.

Section 20 $\frac{1}{2}$, par. 505, ch. 37, Cahill's Ill. Rev. St., 1933, Municipal Court Act, provides:

"There shall be no stated terms of the Municipal Court, but said court shall always be open for the transaction of business. Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a Circuit Court during the term at which the same was rendered in such Circuit Court; provided, a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in

[illegible]

equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Court."

It is impossible to tell from the record whether defendant intended the petition as one in the nature of a bill in equity or as one in the nature of a writ of error coram nobis, but if the petition be treated as a pleading in the nature of a bill in equity or a motion in the nature of error coram nobis it is clear that defendant failed to state facts which would warrant the court in vacating the judgment. The trial court vacated the judgment upon the theory that the statement of claim was fatally defective and that that fact gave him the jurisdiction to vacate the judgment. Even if the pleading in question was defective defendant could not take advantage of that fact by a motion in the nature of error coram nobis. (Marabia v. Mary Thompson Hospital, 308 Ill. 147.) Nor could he obtain relief by setting up such ground in a bill in equity to vacate the judgment. If the declaration is fatally defective a writ of error or appeal is the proper way to correct such error. Moreover, plaintiff's suit was an action of the fourth class in the Municipal court of Chicago. In Sher v. Robinson, 298 Ill. 181, the Supreme court said:

"In Unberg v. City of Chicago, 271 Ill. 404, this court had before it the consideration of what was necessary to be stated in a statement of claim in a municipal court in tort actions of the fourth class, and held that in such an action it was not necessary to allege the giving of the statutory notice even though such statement was necessary in common law declarations for a similar injury, and after discussing different sections of the said act, on page 408 said: 'A careful consideration of the foregoing sections and other sections of the Municipal Court act leads us to the conclusion that common law pleadings are expressly permitted in actions of the first and second class and that the use thereof is abolished as to fourth-class actions. The issues in actions of the fourth class, so far as pleadings are concerned, are to be indicated by the mere filing of a statement of claim for all demands, set-offs or counter-claims, which shall merely state the account or nature of the demand if the suit is on a contract express or implied, or if in tort, a brief statement of the nature of the tort and such further information as will reasonably inform the defendant of the nature of the case. The statement of an account is not a declaration at common law.

It is not a pleading in the sense or meaning of common law pleadings. Neither does the statement in tort required by said act rise to the dignity of a common law declaration, in our judgment, requiring all the material or ultimate facts of a case to be stated or pleaded.' We think the statement of claim in this case contained the essentials that are required by section 40, as that act was construed in the case just cited. Furthermore, under the strict rules of common law pleading after verdict, we think this judgment should be sustained. It has been often stated with reference to the common law declaration, that if the declaration contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express averment of such matter is cured by the verdict. (Sargent Co. v. Baublis, 215 Ill. 428; Humason v. Michigan Central Railroad Co., 339 Ill. 462, and cases cited.) Moreover, in the municipal court it is sufficient to file in cases of this kind only such a statement of claim as will reasonably inform the defendant of the nature of the case, and it should be held that after verdict and judgment it must be presumed that proof was made as to the question of due care on the part of the plaintiff."

The allegation in a common law declaration "that the plaintiff casually lost the goods and chattels described in the said statement of claim in trover and that the said goods and chattels of the plaintiff came to the possession of the defendant by finding," merely states an old common law fiction and it is idle to argue that the instant statement of claim is not sufficient to reasonably inform defendant of the nature of plaintiff's case.

Thirty days had elapsed between the time of the entry of the judgment and the filing of the petition, the trial court was without jurisdiction to vacate the judgment under the facts set up in the "petition" of defendant, and the motion of plaintiff to strike the petition should have been sustained.

The order of the Municipal court of Chicago entered on January 3, 1933, is reversed.

ORDER REVERSED JANUARY 3, 1933, REVERSED.

Friend, P. J., and Sullivan, J., concur.

37741

RUDOLPH E. KAROW,
Appellant,

v.

PAUL ELLGUTH et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 634³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 15, 1932, before a justice of the peace, plaintiff recovered a judgment against defendants Paul Ellguth and Norma Ellguth for the restitution of certain premises in Forest Park, Illinois. Defendants appealed to the Circuit court of Cook county and gave a statutory appeal bond signed by themselves as principals, and Natalie Hornischer, as surety, in the penal sum of \$2,000. When the appeal was called for trial in the Circuit court the following order was entered, on December 19, 1932:

"On agreement of the parties to this suit now here made in open court, it is ordered that the appeal herein be and the same is hereby dismissed at defendants' costs for want of prosecution and that a procedendo do issue herein to the court below. It is further ordered that the writ of procedendo be stayed until February 1st, 1933."

During one of the last days of January, 1933, defendants Paul Ellguth and Norma Ellguth surrendered possession of the premises in question to plaintiff, who then demanded of them the amount of rent due, \$575, and upon their refusal to pay same plaintiff, on May 12, 1933, instituted the instant action on the appeal bond against the Ellguths and Natalie Hornischer, and on May 19, 1933, a judgment for plaintiff was entered for \$500 and costs of suit, plaintiff waiving all claim to any sum due in excess of \$500.

STATE OF NEW YORK
IN SENATE
JANUARY 18, 1933

SENATE REPORT NO. 1033

THE SENATE REPORT NO. 1033

REPORT OF THE
COMMISSIONER OF
THE STATE DEPARTMENT
OF AGRICULTURE
AND FORESTRY
FOR THE YEAR
1932

On October 12, 1932, before a Justice of the Peace, Plaintiff recovered a judgment against defendant Paul Altmann and Norma Altmann for the violation of certain provisions in Forest Park, Illinois. Defendant's appeal to the Circuit Court of Cook County and gave a statutory appeal bond signed by themselves as principals, and Metairie Hornbacher, as surety, in the penal sum of \$2,000. When the appeal was called for trial in the Circuit Court the following order was entered, on December 19, 1932:

"On agreement of the parties to this suit now here made in open court, it is ordered that the appeal be set aside and the case is hereby ordered to be retried, with the cost of transportation and other expenses to be paid by the party against whom the appeal was entered and the case is set for trial on January 1st, 1933."

During one of the last days of January, 1933, defendant Paul Altmann and Norma Altmann returned possession of the premises in question to plaintiff, who then demanded of them the amount of rent due, \$575, and upon their refusal to pay same plaintiff, on May 12, 1933, instituted the instant action on the appeal bond against the Altmanns and Metairie Hornbacher, and on May 12, 1933, a judgment for plaintiff was entered for \$500 and costs of suit, plaintiff waiving all claim to any sum due in excess of \$500.

Defendants prayed an appeal from this judgment to the Circuit court of Cook county and upon a trial, de novo, before the court, without a jury, judgment was entered in favor of defendants, the trial court basing its decision upon the theory that the order of December 19, 1932, released the surety. Plaintiff has appealed from this judgment. There was no dispute that the sum due plaintiff for rent amounts to \$575, but plaintiff waived all claim for rent in excess of \$500. Defendants have not seen fit to defend the record.

Plaintiff contends that the trial court misinterpreted the effect of the order of December 19, 1932; that the said order amounted to an affirmance of the judgment appealed from so as to entitle plaintiff to claim a forfeiture of the bond and to have his action therefor. This contention is a meritorious one. (See Koelling v. Wachsming, 174 Ill. App. 321, 322-3; L. W. Hubbard Fertilizer Co. v. Jacobellis et al., 199 Ill. App. 370; McConnel v. Swailes, 2 Scam. 571; Grossman v. Cohen, 207 Ill. App. 156; Garrick v. Chamberlain, 97 Ill. 620; Adams v. Taylor, 250 Ill. App. 598, 600; People v. Sleight, 302 Ill. 45, 47-8.) In the last mentioned case the court held that the principle of law announced in McConnel v. Swailes, *supra*, and Garrick v. Chamberlain, *supra*, had been consistently adhered to by the court. The fact that plaintiff agreed that the order in question be entered did not tend to change the character and effect of the order. Defendants had the right to dismiss their appeal at their own costs for want of prosecution, and plaintiff had no power to control the action of defendants in that regard. As stated in Cooldridge v. Rawlings, 14 S. W. (Tex.) 667, 668:

"The fact that the appellant consented to a dismissal of the appeal is more against than in favor of the sureties on the appeal-bond. It was a voluntary abandonment of the cause on appeal."

(See also Drake v. Smythe, 44 Ia. 410.) In the case of Sabbitt

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Plaintiff contends that the total amount claimed exceeds the amount of the order of December 17, 1937; that the order amounted to an affirmation of the judgment appealed from so as to entitle plaintiff to claim a refund of the bond and to have the action therefor. This contention is a matter for the jury to determine.

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1. Unemployment - Unemployment is the state of being without a job. It is a condition where a person is unable to find work despite being actively seeking it. Unemployment can be caused by various factors, including economic downturns, technological advancements, and changes in industry demand. It is a significant social and economic issue that affects individuals and communities worldwide.

Examinee's name: _____

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time of the investigation. The investigation was completed on 11/1/54.

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v. Finn, 101 U. S. 7, 13 & 15, respectively, the court said:

"Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. Dolby v. Jones, 2 Dev. (N.C.) L. 109; Ashby v. Sharp, 1 Litt. (Ky.) 156; Robinson v. Plimpton, 25 N. Y. 484; Smith v. Falconer, 11 Hun (N. Y.), 481; Gardner v. Barney, 24 How. (N. Y.) Wr. 467-469; Smith v. Crouse, 24 Barb. (N. Y.) 433. * * * when they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the Appellate Court, either directly or by a mandate sent down to the subordinate court, the sureties proprio vigore become liable to the same extent as the principal obligor." (Italics curs.)

It is plain that the trial court misinterpreted the effect of the order in question, and from the undisputed facts it appears that the amount due plaintiff is \$516, which consists of \$500 for use and occupancy of the premises in question, \$11 for costs of suit before the justice of the peace, and \$5 for plaintiff's appearance fee in the Circuit court of Cook county.

The judgment of the Circuit court of Cook county will be reversed and judgment will be entered here in favor of plaintiff and against defendants in the sum of \$516.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR
OF PLAINTIFF AND AGAINST DEFENDANTS IN THE
SUM OF \$516.

Friend, P. J., and Sullivan, J., concur.

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37800

ISAAC KARISH,
Appellee,

v.

JAMES KERNES,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

279 I.A. 634⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A fourth class contract case in the Municipal court of Chicago, tried by the court without a jury, the issues found against defendant, and plaintiff's damages assessed in the sum of \$610. Defendant appeals from a judgment entered upon the finding.

Plaintiff's statement of claim alleges that he was the owner of 128 shares of stock in the Kernes Manufacturing Company, a corporation; that on June 22, 1932, the value of the stock was \$6100; that the par value of the stock was \$50 per share; that on or about June 22, 1932, at 12:45 p.m., he, together with Edward M. Schwartz, his attorney and auditor, made a request and demand upon said corporation to be permitted to examine the books and records of account of the corporation, "as he is by law entitled to do," but that defendant, who was president of the corporation and who had the care, custody and control of all of its books and records, then and there refused, failed and prevented plaintiff from examining its books and records, and, thereby, as "by paragraph 33 of Chapter 32 of the Illinois Revised Statutes, said defendant became liable to this plaintiff in the penal sum of ten per cent (10%) of the value of the stock owned by this plaintiff as stockholder in said corporation, and therefore he

brings his suit." Defendant's affidavit of merits denies that plaintiff is the owner of the stock enumerated in the statement of claim; denies that on June 22, 1932, the value of said stock was \$6,100; admits that he is the president of the Kernes Manufacturing Company, a corporation, but denies that on June 22, 1932, "he as such President was in the care, custody and had control of all of the books and records of the said corporation, and denies that as such President he then and there refused and failed and prevented the plaintiff from examining the books and records of said corporation, as in said Statement of Claim alleged."

After the finding by the trial court defendant filed the following written motion for a new trial:

"Now comes James Kernes, Defendant, by Klenha & Greenfield, his Attorneys, and moves the Court to grant a new trial of the above entitled cause upon the following grounds:

"1. Plaintiff has failed to prove his case by a preponderance of the evidence.

"2. Plaintiff has failed to prove by a preponderance of the evidence that he made proper demand at a reasonable time upon Defendant for permission to examine the books and records of account of the Kernes Manufacturing Company.

"3. Plaintiff failed to prove by a preponderance of the evidence that Defendant refused him permission to examine the books of said corporation on the date alleged in Plaintiff's Statement of Claim.

"4. Plaintiff failed to prove by a preponderance of the evidence the value of his stock in Defendant Corporation on the date alleged in Plaintiff's Statement of Claim."

Section 45, par. 45, Ch. 32, Cahill's Ill. Rev. St., 1933, provides:

"* * * Any person who shall have been a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes, and record of shareholders, and to make extracts therefrom. * * * Any officer, or agent, or a corporation which shall refuse to allow any such shareholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of shareholders, for any proper purpose, shall be liable to such

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*This work was supported by the National Science Foundation, Grant Number 1008080.

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causing the following results:

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"6. Plaintiff failed to prove by a preponderance of the evidence that defendant's conduct was negligent and that defendant's negligence was the proximate cause of the injury to plaintiff's property."

THE UNIVERSITY OF CHICAGO

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shareholder in a penalty of ten per cent of the value of the shares owned by such shareholder, in addition to any other damages or remedy afforded him by law. * * *

Defendant contends that "Section 38 of Chapter 32 of Illinois Revised Statutes is a penal statute," and that "in a proceeding under a penal statute more than a preponderance of the evidence is necessary to authorize a recovery."

"After a motion is made for a new trial and the grounds thereof are stated in writing the party is limited to the errors alleged in the written motion and all other errors are deemed to have been waived. (Chicago City Railway Co. v. Smith, 226 Ill. 178; Yarber v. Chicago and Alton Railway Co., 235 Id. 589; People v. O'Gara, 271 Id. 138; People v. Cione, 293 Id. 321; People v. Perlmutter, 308 Id. 495; People v. Vickers, 326 Id. 290; People v. Gabrys, 329 Id. 101.) Under these authorities defendants were limited to the error assigned in giving the fourteenth instruction." (People v. Hatcher, 334 Ill. 526, 535.)

Other cases to the same effect might be cited, but the aforesaid rule is the settled law of this state. Defendant tried the case upon the theory that a preponderance of the evidence was sufficient to warrant a recovery and he will not be permitted to change his theory in this court. It will be noted that defendant does not contend, in the written motion for a new trial, that plaintiff failed to make out a prima facie case.

Defendant contends that "it is the law in this state that an affirmative statement met with a flat and categorical denial by an equally credible witness, does not constitute that quantum of affirmative proof which the law requires to sustain a judgment," and defendant further contends that this principle of law applies in the instant case to the question of the value of the stock and also to the alleged demand. The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying as to any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where

the weight or preponderance of the evidence lies, it is not necessarily determinative, and a jury or the trial court may be fully warranted in finding in favor of a party even if his case is supported by the lesser number of witnesses. It is the province of a jury or the trial court to pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony.

"The witness' manner, demeanor and bearing upon the stand, - his replies, whether frank and open or reluctant and evasive, - his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, - * * * are always of vital importance in determining to what, if any, credit the witness is entitled." (Ill. & St. L. R. & C. Co. v. Ogil, 92 Ill. 353, 362.)

It is not the law that a verdict or finding which rests alone upon the testimony of one party who is contradicted in toto by another, where both appear to be equally credible, will be set aside upon appeal. (See Eimer v. Miller, 255 Ill. App. 465, 470, and cases cited therein; Shevalier v. Seager, 121 Ill. 564, 570; Hayden v. Miller, 205 Ill. App. 147, 148; Mills & Co. v. Duke, 232 Ill. App. 277, 280.) As stated in this last mentioned case (p. 280):

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. The People v. Greenberg, 302 Ill. 566; The People v. Boetcher, 298 Ill. 580; The People v. Maciejewski, 294 Ill. 390.)" (See also Ryan v. Hart, 200 Ill. App. 470; Rollins v. Kroncke, 262 Ill. App. 648 (Abst.))

In the late case of The People v. Fortino, 356 Ill. 415, 420, the court said:

"This court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v. Schanda, 352 Ill. 38; People v. Burek, 277 id. 621."

Nor is the defendant justified in arguing that it is the testimony of one credible witness against another credible witness. Mr. Schwartz, the accountant, corroborated the testimony of plaintiff.

The trial court saw the witnesses and heard them testify, and after reading the entire evidence we are satisfied that he was justified in believing the testimony offered by plaintiff.

Defendant contends that plaintiff did not prove by a preponderance of the evidence the value of the stock on the date alleged. We find no merit in this contention. Plaintiff proved by defendant's admission that the stock at the time in question was worth \$6,100. Defendant had a full opportunity to produce, upon the trial, the books of the company, all of which were within his control and that would have been the best evidence as to the company's assets, liabilities and earnings. From them the book value of plaintiff's stock could have been easily ascertained. (Cooper v. Mutt, 254 Ill. App. 445, 458.) The withholding or failure to produce evidence available to him gives rise to a presumption against him. (Pipal v. Grand Trunk Western Ry. Co., 341 Ill. 320, 327, and cases cited therein. See also Hall v. Chesapeake & Ohio Ry. Co., 210 Ill. App. 136, 140.)

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

The trial court saw the witnesses and heard their testimony, and after reading the entire evidence we are satisfied that he was justified in believing the testimony offered by Plaintiff.

Defendant contends that Plaintiff did not prove by a preponderance of the evidence the value of the stock on the date alleged. We find no merit in this contention. Plaintiff proved by defendant's admission that the stock at the time in question was worth \$2,100. Defendant had a full opportunity to produce upon the trial the books of the company, all of which were within his control and that would have been the best evidence as to the company's assets, liabilities and accounts. From time to time value of Plaintiff's stock would have been readily ascertainable. (Hooper v. Wells, 204 Ill. App. 440, 400.) The withholding or failure to produce evidence available to him gives rise to a presumption against him. (Smith v. Smith Trust Fund, 204 Ill. App. 440, 400, and cases cited therein, see also Smith v. Thompson & Co. Inc., 210 Ill. App. 440, 400.)

The judgment of the Municipal Court of Chicago is affirmed.

WELLS, P. J., and WILLIAMS, J., CONSENT.

37610

JOHN P. FOLSON,
Appellee,

v.

LINDA B. TITUS KNOX and
SIDNEY B. KNOX,
Appellants.

187
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 634⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John P. Folson sued Linda B. Titus Knox and Sidney B. Knox in the Municipal court of Chicago in an action of the fourth class. The case was tried by the court without a jury. As shown by the original record filed in the case, the court, on May 18, 1934, entered the following order:

"Now come the parties to this cause, and thereupon the trial of this cause is now here resumed before the Court without a jury, and the Court having heard the evidence, and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit:-

"THE COURT FINDS THE ISSUE VERSUS THE DEFENDANTS, LINDA B. TITUS KNOX AND SIDNEY B. KNOX, AND AWARDERS THE DAMAGES IN THE SUM OF THREE HUNDRED FORTY FIVE AND NO/100 DOLLARS (\$345.00)."

"Now come the defendants in this cause, and move the Court that a new trial of this cause be granted, and the Court being fully advised in the premises overrules said motion, and denies a new trial of this cause to be granted.

"Now comes the defendants in this cause, and moves the Court in arrest of judgment in this cause, and the Court being fully advised in the premises overrules said motion.

"This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment on the finding herein, and that the plaintiff have and recover of and from the defendants, Linda B. Titus Knox and Sidney B. Knox, the damages of the plaintiff amounting to the sum of Three Hundred Forty Five and no/100 Dollars (\$345.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor.

"Now come the defendants and pray an appeal from the judgment of even date to the Appellate Court in and for the First

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District of Illinois, which appeal is granted on condition that said party file herein an appeal bond conditioned according to law in the sum of Five Hundred and No/100 Dollars (\$500.00) with security to be approved by this Court, said bond to be filed and approved herein within thirty (30) days from this date.

"It is ordered by the Court that sixty (60) days be allowed in which to file Bill of Exceptions."

Defendants appealed to this court and after their brief had been filed here a supplemental record was filed here which shows the following order, entered in the trial court on November 22, 1934:

"This matter coming up on motion of the plaintiff to correct the record in the above cause to conform to the true findings and orders of the Court; and

"It appearing to the Court that the Clerk of this Court entered on the half sheet in this cause under date of May 18, 1934, an order which was incorrect and not in accordance with the findings and orders of the court then and there stated; and that the undersigned, the Honorable Francis Borrelli, the then presiding judge has a clear remembrance of what occurred at that time, and further had his memory refreshed by now having just read the transcript of testimony and the proceedings in this cause at that time and which transcript of testimony and proceedings was made by the court reporter for the defendant herein.

"NOW, THEREFORE, this Court finds and hereby orders that said Order of May 18, 1934, is improper and incorrect, and incomplete, and

"HEREBY ORDERS: that said order as heretofore above mentioned be expunged from the record and that the following Order be entered in lieu thereof; as of the date of May 18, 1934, to-wit:

"The Court finds that the defendant, Sidney B. Knox, is not liable in this cause and the cause is as to him hereby dismissed.

"The Court further finds the issues against the defendant, Linda B. Knox, and assesses the damages in the sum of Three Hundred Forty-five and no/100ths Dollars (\$345.00).

"Francis Borrelli
Judge."

The supplemental record also shows that the following order was entered in the trial court on December 8, 1934:

"ORDER TO CORRECT CLERK

"This Order coming up on motion of Plaintiff to correct the Order of November 22, 1934, and the Defendant having due Notice thereof, the Court finds that said Order of November 22, 1934, was correct and proper in the first three (3) paragraphs, but that thereafter it was incorrect; and the Court being advised of the facts,

"NOW HEREBY ORDERS that the last three (3) paragraphs

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THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

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1. The first part of the report is a general statement of the purpose of the study and the objectives to be achieved. This is followed by a brief review of the literature on the subject, and then a description of the methods used in the study. The results of the study are then presented, and finally, a conclusion is drawn from the findings.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

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of said order of November 22, 1934, be expunged; and

"THE COURT HEREBY NOW ORDERS that the following Order be entered as of the date of May 18, 1934, to-wit:

"The Court finds that Sidney B. Knox is not liable in this cause but finds the issues in this cause in his favor, and as to him this cause is hereby dismissed.

"The Court further finds the issues against the Defendant, Linda B. Titus Knox, and assesses damages in the sum of Three Hundred Forty-five (\$345.00) dollars, and judgment will be entered on such finding.

"The Court hereby further orders that as to the Orders having to do with the appeal of this case, and those in connection therewith, stand as of said date of May 18, 1934.

"The Court further orders that any part of the original order of May 18, 1934, which conflicts with this order, or with the Order of November 22, 1934, be expunged from the record.

"Francis Borrelli
Judge

"O.K.
"Walter C. Tellman
Attorney for Deft.

"O.K.
"Geo. B. Holmes
Attorney for Plaintiff."

Plaintiff's statement of claim alleges:

"* * * that on to-wit, February 20, 1933 he was employed by the defendants to render services to said defendants and that he rendered such services from said date to July 1, 1933; that said services consisted of the measurement of 27 parcels of real estate owned by said defendants, said measurements being made by plaintiff of both the lot area and cubic content of improvements situated thereon; and consultation of Chicago Building Department records and assessors' tax lists to ascertain the age of such improvements; the consultation of records in the Chicago Fire Department and the Fire Attorney's Office and Fire Insurance Company records to determine dates of the destruction by fire of various improvements located on said parcels of real estate and the consultation of records in the Building Department as to the dates of various orders of condemnation of improvements on certain parcels of said real estate; that all of said services were rendered for the purpose of ascertaining facts necessary to obtaining a reduction of taxes on said parcels of real estate so owned by said defendants; that said services were rendered by plaintiff to said defendants at their express request and that said defendants promised and agreed to pay plaintiff for such services the sum of \$18.00 per day for himself and an assistant; that there is now due to plaintiff from said defendants the sum of Seven Hundred Twenty (\$720.00) dollars for 40 days work; that although plaintiff has often requested said defendants to pay plaintiff for such services they have refused and still refuse so to do.

"Wherefore plaintiff brings this suit and prays for judgment against said defendants in the sum of \$720.00 and costs of this suit."

Defendant Sidney E. Knox, in his affidavit of merits, denies that he ever owned any real estate or that he personally hired plaintiff to do any work. The affidavit of merits of defendant Linda E. Titus Knox denies that she employed plaintiff to work at the rate of fifteen dollars a day, as alleged in plaintiff's statement of claim, and states that plaintiff and one Anna Malloy did work for her under a verbal agreement whereby she agreed to pay them one-half of what they saved her in reducing taxes on certain parcels of real estate for the years 1928, 1929 and 1930; that said verbal agreement was reduced to writing on April 4, 1933, and on April 18, 1933, at the request of plaintiff and Anna Malloy, the written contract was cancelled, and at the same time defendant entered into a written contract with James W. Breen, an attorney at law, wherein and whereby she agreed to pay said Breen a sum equal to fifty per cent of the amount of taxes saved for the said years "except as to a reduction of one-half of the penalty allowed by law on which said James W. Breen was to receive no part, a copy of which said agreement is attached hereto marked 'Exhibit A.' That said contract with said James W. Breen, was entered into by this defendant at the express request of said plaintiff and said Anna Malloy and was substituted in place of said written agreement with said plaintiff and Anna Malloy * * *, that if plaintiff rendered any services between February 20th, and July 1st, 1933, said services were rendered under the aforesaid verbal agreement for the reduction of taxes as aforesaid between February 20th, 1933 and April 4th, 1933, and under said written contract dated April 4th, 1933, from said date until April 18th, 1933, and that any services rendered by plaintiff between April 18th, 1933 and July 1st, 1933, were rendered to said James W. Breen under and by virtue of his contract with the defendant * * * and that this defendant is not indebted to said plaintiff in any amount whatsoever." Attached to this last affidavit of merits is a copy of the written contract

The following is a copy of the letterhead memorandum
 dated and captioned as above, which was received by the
 Bureau on the above date. The letterhead memorandum
 is being furnished to you for your information.
 Very truly yours,
 J. Edgar Hoover, Director

of April 4, 1933; also a copy of the written contract between defendant Linda B. ritus Knox and James W. Green, dated April 16, 1933.

Many contentions are urged by defendant why the original judgment order, as afterward corrected, should be reversed, but in our view of this appeal we need pass upon only one. It is contended and strenuously argued that the finding and judgment are clearly and manifestly against the weight of the evidence. After a careful examination of the entire evidence we have reached the conclusion that this contention must be sustained. As the case may be tried again we refrain from commenting upon the evidence. We are of the opinion that justice will be best served by a retrial of the cause.

The original judgment order of the Municipal court of Chicago entered May 18, 1934, and also the orders entered November 22, 1934, and December 8, 1934, both purporting to correct the order of May 18, 1934, are all reversed and the cause is remanded for a new trial. It is necessary to reverse the three orders to prevent confusion that might arise from the unusual state of the record.

JUDGMENT ORDERS OF MAY 18, 1934, NOVEMBER 22, 1934,
AND DECEMBER 8, 1934, REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Friend, W. J., and Sullivan, J., concur.

of April 24, 1934; also a copy of the original evidence between the
and State of Illinois from 1934 to 1935, dated April 14, 1934.
Many considerations are urged by defendant why the original
judgment order, as otherwise corrected, should be reversed, but in
our view of this appeal we need pass upon only one. It is contended
and abundantly shown that the finding and judgment are correct and
immediately against the rights of the witness. After a careful
examination of the entire evidence we have reached the conclusion
that this contention must be sustained. In this case we are
convinced that the evidence is sufficient to establish the fact of the
defendant's guilt beyond a reasonable doubt. The original order of the
Chicago Circuit Court of 1934, and also the order which was
reversed, and the order of 1934, both purporting to correct the order
of May 14, 1934, are all reversed and the case is remanded for a
new trial. It is necessary to reverse the order which is granted
contention that might arise from the unusual order of the court.
REVEREND JUDGE OF MAY 14, 1934, CHICAGO, ILLINOIS
THE HONORABLE J. J. KELLY, CHIEF JUSTICE
OF THE SUPREME COURT

Witness, J. J. Kelly, 1934, Chicago, Ill.

36892

CLARISE E. PRYDE,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

279 I.A. 635¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, The Equitable Life Assurance Society of the United States (hereinafter referred to as the insurance company), seeks to reverse a judgment for \$3,487.50 entered against it in plaintiff's favor upon the verdict of a jury in an action of assumpsit brought by plaintiff as the beneficiary named in a policy of insurance upon the life of her husband, Everett H. Pryde. The suit was brought solely to recover a double indemnity benefit for accidental death under the terms of the policy, defendant having paid \$3,000, the face amount of the policy, to plaintiff without dispute after her husband's death. At the conclusion of plaintiff's evidence defendant's motion for a directed verdict was denied. Defendant offered no evidence.

The policy of insurance declared upon contained the following provisions:

"Upon due proof that the death of the Insured occurred in consequence of bodily injury effected solely through external, violent and accidental means, of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, * * * the Society will pay instead of the face amount of this policy, double that amount, making \$6,000. * * *

"This agreement, to pay an increased amount in the event of death from bodily injury, does not cover * * * death resulting directly or indirectly * * * from bacterial infections other than infection occurring simultaneously with and in consequence of an accidental cut or wound."

Appellee

v.

THE UNITED STATES LIFE INSURANCE COMPANY OF THE UNITED STATES, Appellant.

STATE OF NEW YORK

COUNTY OF NEW YORK

2791.A.635

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, The United States Life Insurance

Society of the United States (hereinafter referred to as the

insurance company), seeks to reverse a judgment for \$3,487.50

entered against it in plaintiff's favor upon the verdict of a

jury in an action at law brought by plaintiff as the

beneficiary named in a policy of insurance upon the life of her

husband, Everett H. Hyde. The suit was brought solely to recover

a double indemnity benefit for accidental death under the terms of

the policy, defendant having paid \$3,000, the face amount of the

policy, to plaintiff without dispute after her husband's death.

At the conclusion of plaintiff's evidence defendant's motion for a

directed verdict was denied. Defendant offered no evidence.

The policy of insurance declared upon contained the

following provisions:

"Upon due proof that the death of the insured occurred in consequence of bodily injury effected solely through external, violent and accidental means, or while, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible wound on the exterior of the body, * * * the Society will pay to the beneficiary the face amount of this policy, double that amount, making \$6,000. * * *

"This agreement, to pay an increased amount in the event of death from bodily injury, does not cover * * * death resulting directly or indirectly * * * from bacterial infections other than infection occurring simultaneously with and in consequence of an accidental and or violent."

The insurance company's defense as set forth in its additional special pleas to plaintiff's amended declaration, and to the first and second additional counts thereof, was predicated upon the stipulation in said policy of life insurance "that the agreement in said policy to pay an increased amount in the event of death from bodily injury did not cover death resulting directly or indirectly from bacterial infection other than infection occurring simultaneously with and in consequence of an accidental cut or wound." It was averred that the death of insured occurred from bacterial infection that did not occur simultaneously with or in consequence of an accidental ^{cut} or wound.

Plaintiff testified that prior to August 1, 1929, her husband had always enjoyed good health and was physically active; that she, after a short trip to Battle Creek, Michigan, returned to her home in Elgin, Illinois, on the late afternoon of August 4, 1929; that when she and her husband were retiring that night she saw a blister about the size of her little finger nail on the second toe of his left foot; that "it was a slight elevation of the skin, * * * rather colorless, sort of grayish looking;" that there was no discoloration or swelling at that time and the surrounding skin appeared normal; that it looked the same the next morning; that her husband, wearing his ordinary shoes, went to work that day, August 5, 1929, at 5:50 a.m., and returned home about 4 p.m.; that the blister was then broken and looked raw and watery; that the toes, instep and ankle were swollen and the skin, where the swelling was, looked a little inflamed and red; that he was unable to put on his shoe August 6, and 7, 1929, because the foot was so swollen and he had to remain home from work; that the foot was soaked in a warm boric acid solution; that the swelling subsided so he could get his shoe on and go to work August 8, 1929; that he also went to work August 9, 1929, but came home early that day, very sick and

The insurance company's balance as set forth in its additional special plan to plaintiff's amended declaration, and to the first and second additional counts thereto, was provided upon the stipulation in said policy of life insurance "that the agreement in said policy to pay an increased amount in the event of death from bodily injury did not cover death resulting directly or indirectly from bacterial infection other than infection occurring simultaneously with and in consequence of an accidental cut or wound." It was averred that the death of insured occurred from bacterial infection that did not occur simultaneously with or in consequence of an accidental ^{cut} or wound.

Plaintiff testified that prior to August 1, 1932, her husband had always enjoyed good health and was physically active; that she, after a short trip to Battle Creek, Michigan, returned to her home in Virgin, Illinois, on the late afternoon of August 4, 1932; that when she and her husband were retiring that night she saw a blister about the size of her little finger nail on the second toe of his left foot; that it was a slight elevation of the skin, and a slight redness, and at first he thought it was a mosquito bite; that the next morning when he awoke he noticed the swelling of that foot and the surrounding skin appeared normal; that he looked the same and went about his usual work; that he continued his ordinary work, went to work that day, and the next day, August 6, 1932, at 8:00 a.m., and returned home about a hour and a half later; that when she arose and looked at her husband that the foot, which was then swollen and the skin about the swelling was itched a little inflamed and red; that he was unable to put on his shoe about August 7, 1932, because the foot was so swollen and he had to remain home from work; that the foot was swollen in a warm bath with solution; that the swelling subsided so he could get his foot on and go to work August 8, 1932; that he also went to work August 9, 1932, but came home early that day, very sick and

nauseated; that he never returned to work thereafter; that August 14, 1929, abscesses began appearing on the ends of his fingers and later developed on his toes and legs; that they were like pimples and "would get sort of like boils, would look like boils;" that he became very haggard looking and was taken to the hospital August 22, 1929; and that he was given two blood transfusions, but he continued to grow thin, weak and pale, and died October 5, 1929, at the age of forty-one. Fryde's death certificate gave the cause of his death as malignant endocarditis.

Dr. Arthur B. Rankin, testifying in plaintiff's behalf, was asked to assume the facts testified to by plaintiff and the further fact that Fryde died of malignant endocarditis, and whether, assuming such facts, he could tell what germ it was that produced the malignant endocarditis which caused Fryde's death. He answered that he could and that the germ was a streptococcus. He was then asked whether, from the facts stated in the hypothetical question, he could state with reasonable certainty the time when the streptococcus germs entered the wound. Defendant's counsel objected to this question on several grounds. The witness was permitted to answer and replied that "the streptococcus germs are present in the body as soon as the blister was formed * * * that is, as soon as fluid forms and a blister appears, the germs are in the fluid * * * the germs form a blister." The witness, upon being asked to trace the course of germs of this character in entering the blood stream, stated that they entered the body by means of lymphatics which supply the skin, are carried through the lymphatic vessels in the body to the blood stream and then into the heart. He was then asked if, assuming the description of the blister in its various stages as related by plaintiff, he could tell, with a reasonable degree of medical certainty, whether it was caused by external

...that the first tumor is seen in the ...
14, 1933, abdomen began appearing on the ends of his fingers and
later developed on his toes and legs; that they were like pimples
and "would get sort of like balls, would look like balls;" that he
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22, 1933; and that he was given two blood transfusions, but he
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at the age of forty-one. Tyde's death certificate gave the cause
of his death as malignant endocarditis.

...that Dr. ...
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fluid forms and a blister appears, the germs are in the fluid" - "the
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the course of germs of this character in entering the blood stream,
stated that they entered the body by means of lymphatic vessels which
supply the skin, are carried through the lymphatic vessels in the
body to the blood stream and then into the heart. He was then
asked if, assuming the description of the blister in its various
stages as related by plaintiff, he could tell, with reasonable
degree of medical certainty, whether it was caused by external

violence or by disease. He answered that in his opinion the blister was caused by external violence. The witness was then asked whether, assuming all the facts in the original hypothetical question except that death resulted from malignant endocarditis, he could form an opinion based upon reasonable medical certainty as to the cause of Fryde's death. He stated that it was his opinion that Fryde died from acute septicemia or blood poisoning; and that malignant endocarditis merely signifies an inflammation of the lining of the heart, while acute septicemia described the infection of all the tissues of the body by streptococcus germs.

On cross-examination Dr. Rankin testified that streptococcus germs may be in the body or on the body; that they might be on cloth or gauze or any material of that nature, and are easily transferred from the surface of the material upon which they may be to some other surface; that a blister which is raised a little bit, with the skin having a grayish appearance, has streptococcus germs in it whereas one which is soft and puffy and is covered by a thin layer of skin does not; that when streptococcus "germs get down in between the fissures of the skin and between the various cells on the outer layer of the skin, they go in through the sweat ducts, so when the skin is raised they are already there on the spot ready for business;" that after the blister is broken streptococcus germs might be received into it by contact with some surface that had the germs on it; and that a blister containing streptococcus germs might be innocuous or might result in death.

On redirect examination Dr. Rankin testified that in his opinion the infection of blisters or open wounds "occurs less often than the escape from the presence of the germ;" that the presence of such germs in a blister does not mean the same as streptococcus infection and that the word "infection" has some other meaning.

Dr. A. C. Tenney, testifying in plaintiff's behalf, upon

violence or by disease. He answered that in his opinion the
disease was caused by external violence. The witness was then
asked whether, according to the facts in the medical report,
questioned, that there was any possibility of the disease
being caused by an opinion based upon reasonable medical certainty
as to the cause of the disease. He stated that it was his opinion
that there was some possibility of blood poisoning; and that
malignant endocarditis might result in inflammation of the lining
of the heart. While these conditions described the infection of all
the tissues of the body by streptococcus germs.
On cross-examination Dr. Rankin testified that streptococcus
germs may be in the body or on the body; that they might be on a cloth
or germ or any material of that nature, and are easily transferred
from the surface of the material upon which they may be to some other
surface; that a blister which is raised a little bit, with the skin
having a granular appearance, has streptococcus germs in it whereas one
which is cold and puffy and is covered by a thin layer of skin does
not have streptococcus germs but does in between the layers
of the skin and between the various cells on the outer layer of the
skin, they go in through the sweat ducts, so when the skin is raised
they are already there on the spot ready for invasion; that after
the blister is broken streptococcus germs might be received into it
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of such germs in a blister does not mean the same as streptococcus
infection and that the word "infection" has some other meaning.
The A. C. Tenney, testifying in Plaintiff's behalf, upon

being asked a hypothetical question which assumed the facts testified to by plaintiff and that Pryde's death resulted from malignant endocarditis, and if he had an opinion as to whether the blister was caused by external or internal causes, answered that in his opinion it resulted from an external cause. He also stated that malignant endocarditis of the type described always came from some external introduction of infection, usually gaining admission through an abrasion of the skin or mucous membrane. He was then asked, assuming the original hypotheses and particularly that a hypothetical person, who on August 5, 1929, had a blister, unbroken in the morning, returned to his home at 4 o'clock that afternoon with a broken blister and the foot swollen, whether he could form an opinion as to when the infection took place. Defendant's objection upon several grounds to this question was overruled and the witness answered that in his opinion the infection occurred "at the time or shortly after the breaking of the blister." He then said that a very virulent infection could appear within six or eight hours after the entry of the germ and that infections of that type were most unusual, extraordinary and unexpected.

Defendant contends that the trial court should have directed a verdict in its favor at the close of plaintiff's evidence because the proof introduced by her when taken with all its reasonable inferences in her favor was not sufficient to show that Pryde's death occurred under circumstances covered by the double indemnity provision of the insurance contract; and that Pryde's death having been conclusively shown to have resulted from blood poisoning or septicemia arising from an infected blister on his toe, plaintiff failed to sustain the issue squarely raised by the pleadings, i.e., that the infection causing his death occurred "simultaneously with and in consequence of an accidental cut or wound" as provided in the exception to the policy.

being asked a hypothetical question which assumed the facts stated
 tied to by plaintiff and that Tyke's death resulted from malignant
 endocarditis, and if he had an opinion as to whether the disease
 was caused by external or internal causes, answered that in his
 opinion it resulted from an external cause. He also stated that
 malignant endocarditis of the type described always came from some
 external introduction of infection, usually retaining admission through
 an abrasion of the skin or mucous membrane. He was then asked
 assuming the original hypothesis and particularly that a hypothetical
 person, who on August 1, 1935, had a slight abrasion in the morning,
 returned to his home at 4 o'clock that afternoon with a broken bottle
 and the foot swollen, whether he could form an opinion as to when the
 infection took place. Defendant's objection over several times
 to this question was overruled and the witness answered that in his
 opinion the infection occurred at the time or shortly after the
 abrasion at the elbow. He then said that a very violent infection
 could appear within six or eight hours after the entry of the germ and
 that for reasons of that type, even without abrasions, endocarditis and
 osteomyelitis.

Defendant contended that the trial court should have excluded
 a verdict in the favor of plaintiff's evidence because
 the same introduced by her when taken with all the reasonable infer-
 ence in her favor was not sufficient to show that Tyke's death
 occurred under circumstances covered by the death indemnity provision
 of the insurance contract; and that Tyke's death having been con-
 clusively shown to have resulted from blood poisoning or septicemia
 arising from an infected abrasion on his foot, plaintiff failed to estab-
 lish the issue squarely raised by the pleadings, i.e., that the inter-
 venor caused his death by "accident or wound" as provided in the exception to the
 policy.

Defendant contends further that there was no evidence tending to show that the insured sustained any accidental cut or wound; that, lacking such evidence, plaintiff's case did not come within the coverage of the policy as above set forth; that plaintiff's evidence presented a set of facts from which two or more equally logical inferences could be drawn as to the issues presented by the pleadings, only one of which inferences would be consistent with plaintiff's right to recover, and that, in deciding for plaintiff, the jury necessarily was allowed to indulge in pure speculation and conjecture; that the verdict of the jury was contrary to the law in that it involved basing a presumption upon a presumption; and that the expert medical witnesses called by plaintiff were erroneously permitted to invade the province of the jury by stating their opinions upon the ultimate facts in the case.

Plaintiff's theory is that the exception to the policy which provides that it does not cover death resulting from bacterial infection other than infection occurring simultaneously with and in consequence of an accidental cut or wound does not bar her from recovery; that, having presented evidence from which the jury might find that the accidental creation of the blister and its accidental breaking, either together or separately, were the proximate cause or causes of Fryde's death, the simultaneous occurrence of the wound and infection or lack of such occurrence would be but an incident and inconsequential in the line of causation; that the burden of proof of such lack of coincidence of wound and infection was upon defendant; and that the proximate cause of insured's death was a question of fact for the jury to determine.

The first and main question presented for our determination is whether the exception in the policy is a reasonable and valid provision and not contrary to public policy.

Plaintiff insists that the provision in the exception that the infection must be shown to have occurred simultaneously with the

Defendant contends further that there was no evidence tending to show that the insurer sustained any accidental or non-accidental death resulting from bacterial infection other than infection occurring simultaneously with and in connection with an accidental or non-accidental death. Defendant contends that, having presented evidence from which the jury might find that the accidental or non-accidental death of the insured was the proximate cause of death, either together or separately, were the proximate cause of death of insured's death, the simultaneous occurrence of the wound and infection or lack of such occurrence would be but an incident and inconsequential in the line of causation; that the burden of proof of such lack of coincidence of wound and infection was upon defendant; and that the proximate cause of insured's death was a question of fact for the jury to determine.

Plaintiff's theory is that the exception to the policy which provided that it does not cover death resulting from bacterial infection other than infection occurring simultaneously with and in connection with an accidental or non-accidental death was not part of the contract; that, having presented evidence from which the jury might find that the accidental or non-accidental death of the insured was the proximate cause of death, either together or separately, were the proximate cause of death of insured's death, the simultaneous occurrence of the wound and infection or lack of such occurrence would be but an incident and inconsequential in the line of causation; that the burden of proof of such lack of coincidence of wound and infection was upon defendant; and that the proximate cause of insured's death was a question of fact for the jury to determine.

The first and main question presented for our determination is whether the exception in the policy is a reasonable and valid provision not contrary to public policy. Plaintiff insists that the provision in the exception that the infection must be shown to have occurred simultaneously with the

accidental cut or wound is manifestly unreasonable in that the entrance or time of entrance into the body of the microscopic organisms causing the infection is incapable of proof. It is true that these facts are not capable of direct eyewitness proof, but they are capable of proof as a strong probability based on direct inferences from demonstrable facts. Many things, including all conditions of mind and all events to which there are no eyewitnesses, must be proved in the same way. In this case there is a total want of proof, even of probability, of the inception of the infection. There are no secondary facts from which reasonable inferences as to the ultimate facts can be drawn.

Plaintiff's undisputed evidence shows that the cause of insured's death was acute septicemia or blood poisoning. It has generally been held, subject to the exceptions contained in the policy, that death from blood poisoning following an accident is the direct or proximate result of the accident, regardless of how or when the germs causing the blood poisoning entered and infected the wound or contusion on the exterior of the body. (Central Accident Ins. Co. v. Rembe, 220 Ill. 151; Cary v. Preferred Accident Ins. Co., 127 Wis. 67; Western Commercial Traveler's Ass'n v. Smith, 85 Fed. 401; Hornby v. State Life Ins. Co., 106 Neb. 574, 184 N. W. 34; Knowlton v. Preferred Accident Ins. Co., 199 Ia. 1172, 199 N. W. 1014; McAuley v. Casualty Co. of America, 39 Mont. 135, 102 Pac. 586; French v. Fidelity & Casualty Co., 135 Wis. 259, 115 N. W. 869; Day v. Great Eastern Casualty Co., 104 Wash. 575, 177 Pac. 650.)

Under the rule as declared in the foregoing cases, regardless of how trivial in nature the original injury may have been, if an infection occurred even several days after the injury, and solely because of the utter failure of insured to take any precaution against infection, the insurer would nevertheless be liable for death resulting from such injury.

Double indemnity for accidental death is a type of insurance designed to protect against some of the unforeseeable and unpreventable hazards of life. It was the obvious purpose to exclude from the category of unforeseeable and unpreventable hazards, and from the coverage of the policy in this cause, cases due to the failure of insured to take the proper precautions against infection.

We think the provision in the policy that it does not cover death from bacterial infection, other than infection occurring simultaneously with and in consequence of an accidental cut or wound, is not an unreasonable limitation of defendant's liability and is properly a matter of contract between the parties. The parties had a right to place in their contract such conditions and limitations as they desired, and when these are clear and unambiguous the court must give them effect according to their meaning and intention. (Bahre v. Travellers' Protective Ass'n of America, 211 Ky. 435.)

Although there is expert medical evidence in the record to the effect that the blister in question was caused by external violence, the creation or raising of the blister will, we think, have to be eliminated as a cause of insured's death, inasmuch as the cause of his death was admittedly blood poisoning and there was no evidence of infection as long as the blister remained intact and unbroken. While Dr. Rankin stated that there were always streptococcus germs in the fluid of a blister such as this was, he also testified that their presence did not mean the same thing as streptococcus infection such as developed in insured and resulted in his death from blood poisoning. Dr. Penny, plaintiff's other expert medical witness, testified, and medical authorities generally agree, that the type of streptococcus germ that brought on the infection in this case, almost without exception, enter the body externally through an abrasion of the skin or mucous membrane.

The insured's death having resulted from a bacterial in-

...double indemnity for accidental death is a type of insurance
once designed to protect against some of the uncertainties and un-
preventable hazards of life. It was the obvious purpose to exclude
from the category of unforseeable and unavoidable hazards, and
from the coverage of the policy in this case, cases due to the
failure of insured to take the proper precautions against infection.
To think the provision in the policy that it does not cover
death from accidental infection, other than infection occurring
simultaneously with and in consequence of an accidental cut or wound,
is not an unreasonable limitation of defendant's liability and is
properly a matter of contract between the parties. The parties had
a right to place in their contract such conditions and limitations as
they desired, and when these are clear and unambiguous the court must
give them effect according to their meaning and intention. (Citing
V. Travelers, Protective Ass'n of America, 311 Ky. 488.)
Although there is expert medical evidence in the record
to the effect that the infection in question was caused by bacteria,
violence, the creation or raising of the blister will, we think,
have to be eliminated as a cause of insured's death, inasmuch as
the cause of his death was admittedly blood poisoning and there was
no evidence of infection as long as the blister remained intact and
unbroken. This is exactly what there was ample evidence
to show in the kind of a blister such as this was, he also
testified that their presence did not mean the same thing as atypical
virus infection such as developed in insured and resulted in his
death from blood poisoning. Dr. Young, Plaintiff's expert
medical witness, testified, and medical authorities generally agree,
that the type of streptococcus germ that brought on the infection in
this case, almost without exception, enters the body through some
an abrasion of the skin or mucous membrane.
The insured's death having resulted from a bacterial in-

fection, blood poisoning, it was incumbent upon plaintiff to prove every material fact necessary to entitle her to recover under the terms of the policy. The evidence showed only that the blister was unbroken when it was observed prior to 5:50 a.m., August 5, 1929, and that it was broken and infected at about 4 p.m. the same day. There was a total lack of evidence as to how or when it broke or was broken during the intervening ten hours. But plaintiff insists that, where there is no evidence of the cause of an injury, it will be presumed that, because all men are animated by the instinct of self-preservation, such injury is accidental rather than self inflicted. This presumption, however, depends upon proof of the external, violent nature of the injury and can have no application to the situation presented here. Plaintiff insists that the burden of showing that the assured's death came within the exception limiting its liability was upon defendant. If plaintiff's evidence had not shown that assured's death resulted from bacterial infection, the burden would then have been cast upon defendant to show that it was, to bring it within the exception.

In this state in an action on a beneficial certificate to recover insurance the burden of proof rests upon the plaintiff to establish that the assured met an accidental death under conditions imposing liability expressed in the contract of insurance, notwithstanding the pleas of defendant setting up an exception in the policy limiting its liability. (Fidelity Casualty Co. of New York v. Weise, 182 Ill. 496; Moses v. Illinois Commercial Men's Ass'n, 189 Ill. App. 440.) Plaintiff had the burden of showing that insured suffered an accidental cut or wound, as well as that the infection occurred simultaneously with and in consequence of such cut or wound.

Plaintiff, in defining "accidental," uses this language which is as good as any other - "that, in the act which preceded the injury, something unforeseen, unexpected and unusual occurred

... blood poisoning, it was incumbent upon plaintiff to prove
every material fact necessary to establish her recovery under the
terms of the policy. The evidence showed only that the illness
was unbroken when it was observed prior to 8:30 a.m., August 9,
1930, and that it was broken and infected at about 4 p.m. the same
day. There was a total lack of evidence as to how or when it broke
or was broken during the intervening ten hours. But plaintiff in-
sists that, where there is no evidence of the cause of an injury,
it will be presumed that, because all men are animated by the instincts
of self-preservation, such injury is accidental rather than self-
inflicted. This assumption, however, assumes the proof of the
external, violent nature of the injury and can have no application
to the situation presented here. Plaintiff insists that the burden
of showing that the assured's death came within the exception limiting
the liability was upon defendant. If plaintiff's evidence had not
shown that assured's death resulted from bacterial infection, the
burden would then have been cast upon defendant to show that it was,
in fact, within the exception.
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recover insurance the burden of proof rests upon the plaintiff to
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imposing liability expressed in the contract of insurance, notwith-
standing the plan of defendant setting up an exception in the policy
limiting the liability. Liability Insurance Co. of New York v. Briggs,
127 Ill. 2d, 220, 221, 100 Ill. App. 2d 121, 122.
App. 440.) Plaintiff has the burden of showing that insured suffered
an accidental cut or wound, as well as that the infection occurred
simultaneously with and in consequence of such cut or wound.
Plaintiff, in defining "accidental," uses this language
which is as good as any other - "that, in the act which produced
the injury, something unforeseen, unexpected and unusual occurred

which produced the injury."

The injury in this case must be the cut or wound, and there is no evidence that anything unforeseen or unexpected caused the blister on insured's toe to break. The breaking of the blister is not an "accidental cut or wound" under the terms of the policy, unless the means by which the blister was broken were in turn accidental in the sense that the breaking of the blister was the unexpected, unforeseen and unusual consequence thereof. In this case we do not know what the means were that caused the blister to break or by what agency it became infected.

Plaintiff's counsel, at p. 28 of their brief, say that the jury may "have concluded that wearing his shoe on that day with the blister in its then condition caused it to break at that time, thus permitting the germs to enter," and, on p. 29, "nearly all men know that blisters break under such treatment." On p. 29 they also say, "it makes, as we see it, little difference whether the blister broke in due course or from Pryde's own intentional act." Counsel then argue that it was immaterial how the blister was broken, whether accidentally, intentionally or through natural causes, so long as the result, meaning the infection or the death, was extraordinary and unexpected. This position is untenable and counsel's argument is fallacious in that it entirely disregards the provision of the policy regarding proof of "an accidental cut or wound" and simultaneous infection. Plaintiff's difficulties are wholly due to her lack of knowledge of the facts surrounding her husband's "accidental cut or wound," if there were such, and the coincidence of the infection with same. If it were known and shown that a certain instrumentality or agency caused the accidental breaking of the blister and that such instrumentality or agency was a probable carrier of streptococcus germs which cause septicemia, it could reasonably and logically be inferred that such germs entered the body simultaneously

which produced the injury.

The injury in this case must be the one or more.

and there is no evidence that anything unforeseen or unexpected caused the blister on insured's toe to break. The breaking of the blister is not an "accidental cut or wound" under the terms of the policy, unless the means by which the blister was broken were in some accidental in the sense that the breaking of the blister was the unexpected, unforeseen and unusual circumstance intended. In this case we do not know what the means were that caused the blister to break or by what agency it became infected.

Ministrell's counsel, at p. 18 of their brief, say that the jury may have concluded that wearing his shoe on that day with the blister in its then condition caused it to break at that time, thus permitting the germs to enter, and, on p. 20, "nearly all men know that blisters break under such treatment." On p. 20 they also say, "it makes, as we see it, little difference whether the blister broke in the course of treatment or was intentional act."

Counsel then argue that it was immaterial how the blister was broken, whether accidentally, intentionally or through natural causes, as long as the result, namely, the infection of the foot, was the same. This position is untenable and counsel's argument is fallacious in that it entirely disregards the provision of the policy regarding proof of "an accidental cut or wound" and simultaneous infection. Ministrell's difficulties are wholly due to her lack of knowledge of the facts surrounding her husband's "accidental cut or wound," if there were such, and the consequences

of the infection with same. It is well known and shown that a certain immateriality of agency caused the accidental breaking of the blister and that when immateriality of agency was a probable cause of simultaneous germs which would be sufficient, it would be immaterially

with the breaking of the blister. It has not been shown either that it was an infected agency or an accidental one that caused the blister to break. Since the burden was on plaintiff to prove her case, she must suffer the penalty of failure or absence of proof.

Whether the streptococcus germs that caused the blood poisoning were communicated to insured's body from some instrument used by him in opening the blister, from his clothing or hose, from his hands or fingers, from a bandage or covering that he might have put on it during the day, or from some agency which accidentally caused it to open, we do not know, the doctors do not know and the jury could not know. (McAuley v. Casualty Co. of America, 39 Mont. 185, 192 Pac. 586.)

To establish defendant's liability we must indulge in the following presumptions: First, that the blister was opened by some accidental agency; and second, that such agency was a carrier of streptococcus germs. As a general proposition of law a presumption cannot be based upon a presumption. (Fitch v. Monarch Accident Ins. Co., 239 Ill. App. 479; Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625; Condon v. Schoenfeld, 214 Ill. 226; Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96; City of Chicago v. Carlin, 141 Ill. App. 118; Sertaut v. Grane Co., 172 Ill. App. 477; Campbell v. Centralia Gas & Elec. Co., 224 Ill. App. 589; Klaiber v. South Side Elev. R. R. Co., 226 Ill. App. 422.)

In the case of Globe Accident Ins. Co. v. Gerisch, supra, the court, in discussing this question, used the following language at pp. 628, 629:

"Several physicians were in attendance at the bedside of Gerisch, all of whom testified at the trial. It seems that two days before his death, as a last resort, they performed a surgical operation upon him, and their testimony is based, to a considerable extent, upon the information obtained from an examination of the injured parts. They all agree that the cause of his death was intense inflammation and strangulation of the intestines, and that the diseased condition arose from the dropping of the bowels through an adhesive band - an unnatural growth - which extended from the

with the breaking of the blister. It has not been shown either
that it was an infected agency or an accidental one that caused the
blister to break. Since the burden was on plaintiff to prove her
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Whether the streptococcus germs that caused the blood
poisoning were communicated to insured's body from some instrument
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from his hands or fingers, from a bandage or covering that he might
have put on it during the day, or from some agency which accidentally
caused it to open, we do not know, the doctors do not know and the
jury could not know. Hamby v. Bannock Co. of America, 32 Ind.
181, 182 Pac. 281.

To establish defendant's liability we must indulge in the
following presumptions: First, that the blister was opened by some
accidental agency; and second, that such agency was a carrier of
streptococcus germs. As a general proposition of law a presumption
cannot be based upon a presumption. (High v. Wisconsin Accident Ins.
Co., 238 Ill. App. 478; Elsie Accident Ins. Co. v. Garfield, 183 Ill.
481; Koenig v. Phoenix, 214 Ill. 280; Ohio Building & Loan Ass'n
v. Commercial Trust, 277 Ill. 401; Elsie Accident Ins. Co. v. Garfield, 183
Ill. 481; Garfield v. Elsie Accident Ins. Co., 172 Ill. App. 477; Campbell v.
Central Life & Acc. Co., 224 Ill. 401, 50 Ill. 2d 521; Elsie Accident Ins. Co. v. Garfield, 183
Ill. 481.)

In the case of Elsie Accident Ins. Co. v. Garfield, supra,
the court, in discussing this question, used the following language
at pp. 523, 524:

Trusted physicians were in attendance at the bedside of
Garfield, all of whom testified at the trial. It seems that two days
before his death, as a last resort, they performed a surgical
operation upon him, and their testimony is based, to a considerable
extent, upon the information obtained from an examination of the
internal parts. They all agree that the cause of his death was
intense inflammation and destruction of the intestine, and that
the diseased condition arose from the dropping of the bowels through
an adhesive band - an unnatural growth - which extended from the

wall of the abdomen across to the intestines. They further agree that some force or muscular shock was required to push the bowel through this band, and give it as their opinion that some strain or external violence caused the injury which resulted in their patient's death. This evidence is sufficient, when uncontradicted, to make out the point sought to be established by it, - that is, that Gerisch was strained or was injured by some external force. There is, however, no proof that the deceased strained and injured his body 'by lifting a box of cinders and ashes,' and one essential fact, - indeed, the all-important fact, - is therefore wanting in order to make out this case. If, from the fact that he lifted a box of ashes and from the further fact that he not long afterwards suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz., that Gerisch lifted the box, is itself but a presumption drawn from other facts in evidence, and the law is that a presumption cannot be based upon a presumption, for there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption. (Douglass v. Mitchell, 35 Pa. St. 440; United States v. Crusell, 14 Wall. 1; United States v. Ross, 2 Otto, 281.) In the case last cited it is said, in passing upon this question: 'Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.'

So in this case there is no proof that the blister was broken by an accidental agency and "one essential fact, - indeed, the all-important fact, - is therefore wanting in order to make out this case." If from the fact that the insured received an accidental cut or wound and from the further fact that thereafter he suffered from an infection, it can be inferred that such infection occurred simultaneously with the cut or wound, "the missing link in the chain will be supplied." However, this presumption cannot be indulged as the law as heretofore stated will not permit one presumption to be based upon another.

Complaint is made by defendant that the court erred in permitting plaintiff's expert medical witnesses to express opinions as to the ultimate facts of the case, particularly as to the time of the inception of the infection. The time of the breaking of the blister was not shown by the evidence and it was improper to permit the physicians to state their opinions as to the time of such inception. Such opinions were conjectural and speculative and invaded

the province of the jury. That was one of the ultimate facts in issue in the case which the jury had to determine. If there had been proper evidence in the record as to when the blister broke or was broken, the medical witnesses might have been asked as to whether, in their opinion, the infection, which was later observed, arose at the same time. (Fellows-Kimbrough v. Chicago City Ry. Co., 272 Ill. 71; Illinois Central Ry. Co. v. Smith, 208 Ill. 508; Zbinden v. D'Moulin, 245 Ill. App. 248.)

The following motion was heretofore made by defendant and reserved to hearing:

"Now comes the Appellant, The Equitable Life Assurance Society of the United States, by Mayer, Meyer, Austrian & Platt, its attorneys, and shows unto the court that in and by the Brief and Argument for Appellee, heretofore filed in this cause, there is certain matter, to wit: Point 1 (a) of the Brief on page 4 thereof, and that part of the Argument on pages 10 to 13, inclusive, thereof, which deals wholly with the contention of the Appellee that certain portions of the policy of insurance sued upon in this cause should be disregarded because not printed in the size of type claimed by Appellee to be required by the laws of Illinois; that in and by said matter Appellee seeks to attack rulings of the trial court in this cause; that Appellee has filed no assignment of cross-errors in this cause within the limits of the time for filing same provided by the rules of this court; wherefore Appellant moves that the above described portions of said Brief and Argument for Appellee be ordered stricken."

The record in this case discloses that the insurance contract introduced in evidence by plaintiff was the entire policy, including the provision containing the exception from liability, heretofore discussed, which plaintiff now seeks to have disregarded as invalid because of the relative type sizes used in the policy. Plaintiff must rely on the record as made in the lower court to support her judgment. No motion was made by her in the trial court to strike the alleged obnoxious provision of the policy from the evidence on the ground of its claimed invalidity.

The trial court refused to give to the jury certain instructions requested by plaintiff which set forth her theory that, under the law of this state, the exceptions of the policy limiting defendant's liability should be disregarded because said exceptions

... ..

were not printed "with the same prominence as the benefits to which they applied," and because they were not printed "in bold faced type and with greater prominence than any other portion of the text of the policy."

Plaintiff argues in this court for the affirmance of her judgment on the theory advanced in these rejected instructions, but it has been repeatedly held that if one party appeals the opposite party will be considered as acquiescing in all rulings of the trial court unless his objections thereto are presented in some proper manner to the court of review. Plaintiff, having assigned no cross-errors on the trial court's refusal to give these instructions, cannot be heard to say here that the court improperly rejected them. (Material Service Corporation v. Ford, 341 Ill. 30; Forest Preserve District of Cook County v. Chivers, 344 Ill. 573; Felouze v. Slaughter, 341 Ill. 215; Village of Shumway v. Returno, 235 Ill. 601.)

Where the only purpose of attacking the rulings of the trial court adverse to plaintiff is to have alleged prejudicial errors corrected on a second trial of the cause, an assignment of cross-errors is essential for that purpose. (Felouze v. Slaughter, *supra*.) Such assignment is the pleading of the party in this court and without it we have no right to pass upon the point raised.

Defendant's motion is sustained. Point 1 (a) of plaintiff's brief and pages 10 to 13 of the argument contained therein are ordered stricken from said brief.

Inasmuch as plaintiff's evidence did not make out a case under the terms of the policy declared upon and introduced in evidence, the judgment of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Friend, P. J., and Scanlan, J., concur.

were not printed "in the same prominence as the headline on which they appeared," and because they were not printed "in bold faced type and with greater prominence than any other portion of the card on the policy."

Plaintiff argues in this court for the affirmance of her judgment on the theory advanced in these rejected instructions, but it has been repeatedly held that it was partly against the opposite party will be considered as representing in all rulings of the trial court unless his objections thereto are presented in some proper manner to the court of review. Plaintiff, having assigned no cross-examination as to the trial court's ruling in these instructions, cannot be heard to say here that the court improperly rejected them. (Hartford Fire Insurance Co. v. Hartford, 201 Ill. 201; Hartford v. Hartford, 201 Ill. 201; Hartford v. Hartford, 201 Ill. 201.)

118. Willard v. Willard, 201 Ill. 201. There the only purpose of attacking the ruling of the trial court adverse to plaintiff is to have alleged prejudicial errors reversed on a second trial of the cause, an assignment of error is essential to that purpose. Willard v. Willard, 201 Ill. 201. Such assignment is the pleading of the party in this court and without it we have no right to pass upon the point raised.

Defendant's motion is sustained. Point 1 (a) of plaintiff's brief and pages 12 to 14 of the argument contain therein the stated grounds upon which the court is asked to reverse the ruling of the trial court. The grounds of the circuit court is reversed and the ruling is sustained.

37411

TERESA M. GOTTSCHALK,
Plaintiff in Error,

v.

FRED BECKLENBERG and
MARIA BECKLENBERG,
Defendants in Error.

ERROR TO SUPERIOR
COURT, COOK COUNTY.

279 I.A. 635²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Teresa M. Gottschalk, filed a bill in equity to rescind and cancel a real estate exchange contract entered into between defendant Fred Becklenberg and herself, as well as a contract of release of Becklenberg from all liability for his alleged fraudulent procurement of her execution of such exchange contract. Plaintiff's bill charged that Becklenberg induced her to sign both the exchange contract and the release by his fraudulent representation and concealment of material facts. Defendants filed pleas of res adjudicata, estoppel and release, the first two of which were overruled and plaintiff filed a replication to the plea of release. Upon reference to a master he found that the material allegations of the plea of release had been proven, and recommended that plaintiff's bill be dismissed for want of equity. The chancellor overruled plaintiff's exceptions to the master's report, adopted the master's findings and entered a decree dismissing the bill for want of equity. This writ of error seeks to reverse the decree.

For a clearer understanding of the questions presented for our determination it is appropriate to set forth the history of the relations of the parties to this cause.

November 22, 1924, plaintiff and Fred Becklenberg

THOMAS E. BOTTENHARDT, Plaintiff in Error,

WILLIAM W. BOTTENHARDT, Defendant.

WILLIAM W. BOTTENHARDT, Defendant in Error.

279 I.A. 685

MR. JUSTICE GULLIVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Thomas E. Bottenhardt, filed a bill to compel
 to proceed and cancel a pool table exchange contract entered into
 between defendant Fred Bottenhardt and herself, as well as a con-
 tract of release of Bottenhardt from all liability for the damage
 to plaintiff's bill charged that Bottenhardt induced her to sign both
 the exchange contract and the release by his fraudulent representation
 and concealment of material facts. Defendant filed answer of her
 objections, answer and release, the first two of which were over-
 ruled and plaintiff filed a replication to the plea of release.
 Upon reference to a master he found that the material allegations
 of the plea of release had been proven, and recommended that
 plaintiff's bill be dismissed for want of equity. The recommendation
 was sustained. Plaintiff's exceptions to the master's report, made
 the master's findings and advised a decree dissolving the bill for
 want of equity. This writ of error comes to reverse the decree.
 For a clearer understanding of the questions presented
 for our determination it is appropriate to set forth the history
 of the relations of the parties to this case.

November 22, 1924, Plaintiff and Fred Bottenhardt

executed a real estate exchange contract which specified that the value of his apartment building (Burwood apartments) was \$205,000 and of her improved property \$50,000; that his property was subject to a first mortgage of \$140,000 and that her property was clear; and that as the balance of the purchase price of his property she agreed to give him a \$15,000 purchase money second mortgage on the Burwood apartments.

December 8, 1924, deeds were executed and delivered under the contract and Mrs. Gottschalk took possession of the Burwood apartments and thereafter collected the rents.

September 28, 1925, Becklenberg filed a bill to foreclose the second mortgage, Mrs. Gottschalk having defaulted in the payments due, and had a receiver appointed who took possession of the Burwood apartments.

April 1, 1926, pursuant to a decree of foreclosure of the second mortgage, the master sold the property to Becklenberg for \$17,000 and delivered to him his certificate of sale. The master also reported a deficiency of \$2,620.52, which plaintiff was decreed to pay.

April 8, 1926, a written agreement was entered into between Mrs. Gottschalk and one Sol Rubin, which, after reciting that Becklenberg had grossly swindled plaintiff by inducing her through false representations to exchange her property for his with its incumbrance of \$140,000, and by inducing her to give him in addition to her clear apartment building a second mortgage of \$15,000 on the Burwood apartments so purchased from him, provided that Rubin should furnish the money and time necessary to recover through litigation or settlement the damages suffered by Mrs. Gottschalk through Becklenberg's fraud; that Rubin might use plaintiff's name, when necessary, in litigation or otherwise;

property she agreed to give him a \$15,000 purchase money second mortgage on the Harwood apartment.

Records at FBI : 1961 & 1962
under the control and Mr. Tolson's book possession of the

September 22, 1933, Beckwith was killed a bill to force
the payment of the bill, and was a receiver appointed who took possession
of the business of the company.

the second mortgage, the master sold the property to Bachman for \$15,000 and delivered to him his certificate of sale. The master also received a check from Bachman for \$15,000, which was paid to the master.

April 8, 1936, a written agreement was entered into between the defendants and one Ed Rubin, which, after reading the same, defendant had freely and voluntarily entered into through false representations to exchange her property for his with the sum of \$140,000, and by inducing her to give him in addition to her other apartment building a second mortgage of \$12,000 on the Harvard apartment so purchased from him, provided that Rubin should furnish the money and time necessary to recover the said \$12,000 or settlement the money entered by him.

that plaintiff deposit a quitclaim deed to Rubin of her interest in the Burwood apartments with his attorney, and that Rubin deposit in escrow with such attorney his \$5,000 note payable to plaintiff, and his trust deed upon the Burwood apartments to secure same; that, when the matter was settled by Rubin, he was to be the owner of the property, subject to the payment of the said \$5,000 note to plaintiff; and that she was to be paid by him all money received by him as a result of litigation or settlement over and above his second mortgage of \$15,000, plus fees and costs. (Mrs. Gottschalk delivered her deed to the premises to Rubin's attorney and it was delivered to Rubin and recorded. It does not appear that Rubin ever deposited his \$5,000 note in escrow with his attorney. In any event Mrs. Gottschalk did not receive it and did not receive any of the rents or profits accruing from the Burwood apartments after Rubin took possession May 3, 1926.)

May 3, 1926, Rubin effected a settlement whereby Becklenberg assigned to him his certificate of sale under the second mortgage foreclosure, delivered to plaintiff her second mortgage notes aggregating \$15,000 and satisfied his deficiency decree against her in consideration of Rubin's payment to him of \$6,279 and the delivery of plaintiff's release of Becklenberg from all claims for damages against him for fraud, deceit or misrepresentation in connection with the exchange of their properties. The receiver under the second mortgage foreclosure having been discharged pursuant to this settlement, and plaintiff having conveyed her interest and title in and to the premises to him, Rubin took possession of the Burwood apartments and thereafter collected the rents.

December 15, 1926, a bill was filed by the trustee under the first mortgage trust deed to foreclose same, the entire bond issue having been accelerated because of Rubin's default in the

payment of taxes and interest on the first mortgage bonds, and a receiver was appointed who immediately took possession of the premises. Although Mrs. Gottschalk was not made a party to the first mortgage foreclosure proceeding, she attended practically all of the hearings held therein before the master and testified that she was satisfied with Rubin's conduct of her affairs. A decree of foreclosure and sale was entered and Becklenberg, who was primarily liable on the outstanding first mortgage bonds, purchased the Burwood apartments at the master's sale for \$154,480.34, the amount required to cover such bonds, accrued interest, solicitor's fees, master's fees and costs. Upon Rubin's appeal the decree in that cause was affirmed by this court and thereafter certiorari was denied by the Supreme court.

After the master's report in that case had been filed and just prior to the entry of the aforesaid decree Mrs. Gottschalk filed a petition in which she repudiated Rubin and sought to intervene in that cause. In its decree the trial court denied her right to intervene.

In the instant case Mrs. Gottschalk made Rubin and his wife parties in both her original bill and in her first amended bill. Although persisting in her charge that Rubin and Becklenberg had conspired to defraud her, she failed to make Rubin a party defendant in her second amended bill, upon which this cause was heard.

The prayer of plaintiff's second amended bill is, in substance, that a "purported release" dated May 3, 1926, given by plaintiff to Becklenberg "be annulled and cancelled;" that Becklenberg and his wife be required to convey to plaintiff the "Montrose avenue property," (which she traded) if he should now own it, and that Becklenberg be required to account for all rents and profits collected by him therefrom since he acquired title; but should it appear that

payment of taxes and interest on the first mortgage bonds, and
a receiver was appointed who immediately took possession of the
premises. Although Mrs. Gottschalk was not made a party to the
first mortgage foreclosure proceedings, she attended personally
all of the hearings held thereon before the master and testified
that she was satisfied with Rubin's conduct of her affairs. A
decree of foreclosure and sale was entered and Beckenbach, who
was primarily liable on the outstanding first mortgage bonds, pur-
chased the foreclosed premises at the master's sale for \$10,430.00.
The amount paid for the property was \$10,430.00, interest included.
Rubin's taxes, master's fees and costs. Upon Rubin's appeal
the decree in that case was affirmed by this court and thereafter
execution was issued by the Supreme Court.
After the master's report in that case had been filed
and just prior to the entry of the aforesaid decree Mrs. Gottschalk
filed a petition in which she requested Rubin and sought to inter-
vene in that cause. In the decree the trial court denied her
right to intervene.
In the instant case Mrs. Gottschalk made Rubin and his
wife parties in both her original bill and in her first amended bill.
Although persisting in her charge that Rubin and Beckenbach had
conspired to defraud her, she failed to make Rubin a party defendant
in her second amended bill, upon which she now stands.
The prayer of plaintiff's second amended bill is, in sub-
stance, that a "purported release" dated May 2, 1926, given by plain-
tiff to Beckenbach "be annulled and rescinded;" that Beckenbach
and his wife be required to convey to plaintiff the "undivided several
property," (which she traded) if he should now own it, and that
Beckenbach be required to account for all rents and profits collected
by him claiming that he acquired title; and should it appear that

other persons, not parties to this suit, in good faith, for value and without notice, have acquired good title to the property, that Becklenberg be required to account to plaintiff as to all dealings and transactions between him and her; that their respective rights and interests be ascertained; that he be ordered to pay to her what money, if any, shall appear to be due to her on such accounting, together with costs and solicitor's fees; and that she may have such other relief as equity may require.

Although Mrs. Gottschalk's second amended bill is a voluminous document, replete with allegations of Becklenberg's fraudulent conduct both in the procurement of the exchange contract and of her release of his alleged fraud, in her reply brief it is conceded that the only question presented for our determination is whether Becklenberg's alleged fraudulent concealment from her of the reduction of the first mortgage bond issue on the Burwood apartments from \$140,000 to \$130,000 and the return to him and subordination of \$10,000 of the \$140,000 bonds originally contemplated as the amount of the loan as recited in the trust deed filed of record, entitled her to a rescission and cancellation of her release and of her original exchange contract.

Plaintiff's replication to defendants' plea of release admitted its sufficiency and the issue is narrowed down to the truth of the following allegations of such plea: "While knowing when she executed the release to Becklenberg that * * * Becklenberg had acquired the \$10,000 bonds as alleged in the second amended bill, yet she falsely alleged in her second amended bill of complaint that she had no knowledge thereof until after the aforesaid release was executed and delivered. * * * That such release was freely, fairly and voluntarily given on the date thereof."

Although Mrs. Gottschalk testified, and it is

other persons, not parties to this suit, in good faith, for value and without notice, have received good title to the property, that Bookenberg be required to account to Plaintiff as to all dealings and transactions between him and her; that their respective rights and interests be ascertained; that he be ordered to pay to her what money, if any, shall appear to be due to her on such accounting; together with costs and solicitor's fees; and that she may have such other relief as equity may require.

Although Mrs. Gottschalk's second amended bill is a voluminous document, it is a statement of Bookenberg's transactions commencing with the procurement of the exchange contract and of her release of his alleged friend, in her reply brief it is contended that the only question presented for our determination is whether Bookenberg's alleged fraudulent concealment from her of the retention of the first mortgage bond issues on the Elwood apartments from \$140,000 to \$130,000 and the return to him and subordination of \$10,000 of the \$140,000 bonds originally contemplated as the amount of the loan as recited in the trust deed filed of record, entitled her to a rescission and cancellation of the release and of the alleged exchange agreement.

Plaintiff's replication to defendant's plea of release limited the controversy and the issue is narrowed down to the truth of the following allegations of such facts "While knowing that she executed the release to Bookenberg that * * * Bookenberg had acquired the \$10,000 bonds as alleged in the second amended bill, yet she fraudulently alleged in her second amended bill of exchange that she had no knowledge thereof until after the release was executed and delivered. * * * That such release was freely, fairly and voluntarily given on the date thereof."

Although Mrs. Gottschalk testified, and it is

strenuously argued on her behalf, that she did not meet Rubin until April 5, 1926, a release signed by her and witnessed by Rubin under date of February 11, 1926, was received in evidence. Though disputing the date of this document Mrs. Gottschalk admitted executing, prior to the release of May 3, 1926, at Rubin's request, a release of Becklenberg from any claim that she might have had against him by reason of the exchange of their properties. The first release was unsatisfactory to Becklenberg and when so advised plaintiff signed the release in question, which was accepted by Becklenberg as part of the consideration for his assignment to Rubin of the certificate of sale under the second mortgage foreclosure, his surrender of her \$15,000 second mortgage notes, which were cancelled, and the satisfaction of his deficiency decree against her. In connection with Becklenberg's refusal to accept her first release plaintiff testified that Rubin "said Becklenberg was not satisfied with the first release, that he wanted more added to it, more inserted * * * and that he wanted me to sign a better release, releasing him from everything that could possibly be released from, so that there would be no comeback. * * * So I signed it."

As far as plaintiff was concerned the subordination agreement could only have affected the value of Becklenberg's property. She purchased the Burwood apartments with full knowledge that the property was subject to an incumbrance of a bond issue of \$140,000. She had complete possession of the property for about ten months, commencing December 3, 1924. She was fully conversant with its income, upkeep and the charges upon it and had every opportunity to ascertain its value long prior to May 3, 1926, when she executed the release. She failed to make the stipulated payments on the second mortgage. That mortgage was foreclosed. A receiver supplanted her in possession. Becklenberg purchased the property at the second

extensively argued on her behalf, that she did not meet Rubin until April 5, 1936, a release signed by her and witnessed by Rubin under date of February 11, 1936, was received in evidence. Through disputing the date of this document Mrs. Gottschalk admitted executing, prior to the release of May 3, 1936, at Rubin's request, a release of Becklenberg from any claim that she might have against him by reason of the assignment of that property. The first release was unattested by Becklenberg and when so advised Plaintiff signed the release in question, which was accepted by Becklenberg as part of the consideration for his assignment to Rubin of the certificate of sale under the second mortgage foreclosure, his extension of her \$15,000 second mortgage notes, which were cancelled, and the satisfaction of his deficiency decree against her. In connection with Becklenberg's refusal to accept her first release Plaintiff testified that Rubin "said Becklenberg was not satisfied with the first release, that he wanted more added to it, more inserted * * * and that he wanted me to sign a better release, releasing him from everything that could possibly be released from, so that there would be no comeback. * * * So I signed it."

As far as Plaintiff was concerned the stipulation agreed upon would only have affected the value of Becklenberg's property. She purchased the Bureau apartment with full knowledge that the property was subject to an incumbrance of a bond issue of \$145,000. She had complete possession of the property for about ten months commencing December 2, 1934. She was fully conversant with the income, upkeep and the charges upon it and had every opportunity to ascertain the value long prior to May 3, 1936, when she executed the release. She failed to make the stipulated payments on the second mortgage. That mortgage was foreclosed. A receiver appointed was in possession. Becklenberg purchased the property at the second

mortgage foreclosure sale for \$17,000 and secured a deficiency decree against her for \$2,620.32. She charged Becklenberg with fraud. She engaged Rubin to litigate or settle with Becklenberg because of his alleged fraud. Rubin, we may assume, accused Becklenberg of defrauding plaintiff. The record discloses no admission of fraud on Becklenberg's part. A settlement was agreed upon between Becklenberg, Rubin and plaintiff that included plaintiff's release of Becklenberg from every possible charge of fraud in connection with his exchange of properties with her, "so that there would be no comeback." For her release and Rubin's \$6,279 Becklenberg gave her back her \$15,000 second mortgage notes for cancellation, satisfied his deficiency decree against her, and, with her knowledge and consent, assigned to Rubin his \$17,000 certificate of sale of the property.

It is urged that plaintiff did not by her release waive her right of action against Becklenberg for his alleged fraudulent concealment of the subordination agreement, because when she was induced to sign said release she had no knowledge of such agreement. The record does not disclose what frauds plaintiff's agent, Rubin, charged Becklenberg with, but it does show that Becklenberg refused to deal with plaintiff or Rubin unless she gave him a release that was comprehensive enough, according to her own testimony, to release him from everything that he could possibly be released from. Becklenberg insisted on that kind of a release. Plaintiff was fully advised that no other kind of a release would be acceptable to him. She gave him that sort of a release for a valuable consideration and she cannot now be heard to say that it did not cover the alleged fraudulent concealment of the subordination agreement, as well as any and every other fraud that she or Rubin might have charged him with.

In any event Becklenberg testified that prior to the

In any event Becklenberg testified that prior to the
every other time that she or Boris might have changed the
last consentment of the substitution agreement, as well as any and
cannot not be heard to say that it did not cover the alleged trans-
fers and that out of a release for a release consentment and the
that no other kind of a release would be acceptable to him. She
being insisted on that kind of a release. Plaintiff and fully advised
him from everything that he could possibly be released from. Becklen-
berg was comprehensive enough, according to her own testimony, to release
is deal with Plaintiff as Boris might have given him a release that
changed Becklenberg with, but it does show that Becklenberg returned
the money does not release what Thomas Plaintiff's agent, Boris,
intended to sign said release she had no knowledge of such agreement.
consentment of the substitution agreement, however that she was
was right of action against Becklenberg for the alleged fraudulent
It is noted that Plaintiff did not go out release alive
property.
consent, executed by Boris his \$17,500 certificate of sale of the
his testimony before against her, and, with her knowledge and
back but \$12,500 instead of \$17,500 before the substitution, testified
comeback." For her release and Boris's \$17,500 Becklenberg gave her
his exchange of testimony with her, "as that alone would be an
Becklenberg from every possible charge of fraud in connection with
Becklenberg, Boris and Plaintiff that Plaintiff's release of
of fraud on Becklenberg's part. A settlement was entered upon between
liability of Becklenberg Plaintiff. The court dismissed the complaint
because of his alleged fraud. Again, we may assume, assumed Beck-
with fraud. The alleged fraud is alleged to exist with Becklenberg
Becklenberg against her for \$17,500. She charged Becklenberg

execution of the contract for the exchange of their properties plaintiff was fully advised by him as to the terms of the subordination agreement. While the testimony was in sharp conflict on this issue, after a thorough examination of all the evidence in the record, we are impelled to concur in the following findings of the master and his conclusion thereon, which were incorporated in the chancellor's decree:

"14. The Master further finds that said release by said complainant was for a good and valuable consideration, that she knew the purport thereof and that no misrepresentations were made to her at the time, by Becklenberg, or by anyone on his behalf.

"15. The Master concludes that the material allegations in said third plea have been proven."

As to the weight to be given by a court of review to the findings of fact of a master and the decree of the court founded thereon, the rule is correctly enunciated, we think, in Gottschalk Construction Co. v. Carlson, 253 Ill. App. 520, where the court after reviewing numerous decisions dealing with the subject, said at page 535:

"While the report of the master is not conclusive upon any fact unless it meets with the approval of the court of review before whom the record may be, yet such findings of fact will not be disturbed by a court of review unless such court, upon due examination of all such evidence, is able to say that the findings of the master, and the decree of the court founded thereon, are not supported by the greater weight of the evidence, or are contrary to its probative force."

Many other points have been urged and cases cited which we have carefully considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated herein the decree of the Superior court is affirmed.

AFFIRMED.

Scanlan, J., concurs.

execution of the contract for the exchange of child's possession

plaintiff was fully advised by him as to the terms of the

contractual agreement. While the testimony was in this case

filed on this issue, after a thorough examination of all the

evidence in the record, we are impelled to answer in the following

findings of the master and the conclusion thereon, which were

incorporated in the chancellor's decree:

"1. The master found that this child was not
held as a slave but for a time and as a domestic servant,
that she knew the purpose thereof and that no misrepresentation
was made to her at the time, by Beckwith, or by anyone on
his behalf.
"2. The master concludes that the master
allegation is also true and has been proven."

As to the weight to be given by a court of review to

the findings of fact of a master and the basis of his court

founded thereon, the rule is correctly enunciated, we think,

in Beckwith v. Beckwith, 100 Va. 111, 112, 113, 114, 115.

When the court reviews master's findings dealing with

the subject, said at page 123:

"While the report of the master is not conclusive upon
any fact unless it accords with the weight of the evidence, it
carries much weight and, yet such findings of fact will not
be disturbed by a court of review unless there is some
prejudicial error of all such evidence, in which case the findings
of the master, and the basis of his court founded thereon, are
not accepted by the court of review, and the case is
sent to the jury for its decision."

Many other points have been urged and cases cited which

we have carefully considered, but in the view we take of this case

we deem it unnecessary to discuss them.

For the reasons indicated herein the decree of the Superior

court is affirmed.

ATTEST:

Beckwith, J., concurring.

37547

EDWARD H. MORRIS, receiver
for the Binga State Bank,
a corporation, (plaintiff),
Appellant,

v.

ADOLPH H. ROBERTS, Sr.,
(defendant), Appellee.

1017
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 685³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

September 29, 1931, a judgment by confession for \$2,018.75 was entered on a note executed by defendant, dated December 20, 1926, for \$1,500, due six months after date, payable to Binga State Bank, which on petition of defendant was opened and he was given leave to appear and defend, the judgment to stand as security. March 4, 1932, there was a trial before the court without a jury, resulting in a finding in favor of defendant and the judgment by confession of September 29, 1931, was vacated, the suit dismissed and a judgment for costs was rendered against plaintiff. This judgment was reversed and the cause remanded in an unpublished opinion filed by this court October 4, 1932, General No. 36027, appellate court, first district.

Upon the filing of the mandate of this court in the municipal court, the cause was reinstated and proceeded to trial by the court without a jury on the original confession of judgment and on defendant's same petition to open said judgment which was before this court on the prior appeal and which was allowed to stand as his affidavit of merits. The trial court again found against plaintiff, dismissed his suit and entered judgment for defendant. This appeal seeks to reverse that judgment.

1937

WILLIAM H. MOHRIS, Receiver
for the Kings State Bank,
(Plaintiff),
vs.
JOHN J. MOHRIS, Jr.,
(Defendant).

COURT OF CHANCERY
STATE OF NEW YORK

279 I.A. 682

THE JUDICIAL OFFICE DELIVERED THE DECISION OF THE COURT.

September 12, 1937, a judgment by the court in the case of
the plaintiff in a case brought by defendant, dated September 12, 1937,
for \$1,000, was six months after date, payable to Kings State Bank,
which on petition of defendant was opened and he was given leave to
appeal and defend, the judgment to stand as a security. March 4, 1938,
there was a trial before the court without a jury, resulting in a
finding in favor of defendant and the judgment by confession of
September 12, 1937, was vacated, the suit dismissed and a judgment
for costs was rendered against plaintiff. This judgment was reversed
and the case remanded in an unpublished opinion filed by this court
October 4, 1938, General No. 48087, special court, first district.
Upon the filing of the mandate of this court in the
municipal court, the cause was reinstated and proceeded to trial by
the court without a jury on the original confession of judgment and
on defendant's same petition to open said judgment which was before
this court on the prior appeal and which was allowed to stand in his
favor by the court. The trial court again found against plaintiff,
dismissed his suit and entered judgment for defendant. This appeal
comes to review that judgment.

Defendant's affidavit of merits did not deny the execution or delivery of the note but alleged, in substance, that one Jesse Binga, and not plaintiff, was the true owner of the note and that there was no consideration given for same. On the trial defendant appears to have abandoned the latter defense. His theory, both in the trial court and here, is that plaintiff is precluded from recovery because of his failure to prove delivery of the note to the Binga State Bank, without which proof he claims there is no showing that plaintiff was the legal owner of the note or that he held legal title thereto.

Here, as on the former appeal, the undisputed evidence discloses that plaintiff is the receiver of the Binga State Bank, a banking corporation; that the note involved was executed by defendant and is payable to the Binga State Bank; that after its execution defendant delivered it to a Miss Cantey, the auditor of the Binga State Bank; that after plaintiff was appointed receiver of the bank he brought suit on the note. On the trial plaintiff introduced the note in evidence and rested. Thereupon defendant testified that about the time the note was executed, Jesse Binga transferred to him 10 shares of the capital stock of the Binga State Bank, and defendant became and continued to act as one of the board of directors of the bank until it was closed by the auditor of public accounts of the State of Illinois; that from the date of the execution of the note until judgment was entered thereon no demand had been made on him to pay it, nor was any mention made of the existence of the note in any meeting of the board of directors of the bank; and that prior to signing it he talked to Jesse Binga about the note.

Jesse Binga testified that he had been president of the Binga State Bank from 1921 to 1932; that he had the note in his private safe at the bank and at no time delivered it to anyone representing the bank. While it is unnecessary for us to pass upon the

Defendant's affidavit of merits did not deny the execution

or delivery of the note but alleged, in substance, that one Jesse King, and not plaintiff, was the true owner of the note and that there was no consideration given for same. On the trial defendant appeared to have abandoned the latter defense. His theory, both in the trial court and here, is that plaintiff is precluded from recovery because of his failure to prove delivery of the note to the Kings State Bank, without which proof he claims there is no showing that plaintiff was the legal owner of the note or that he held

legal title thereto.

Here, on the former appeal, the uncontroverted evidence disclosed that plaintiff is the receiver of the Kings State Bank, a banking corporation; that the note involved was executed by defendant and is payable to the Kings State Bank; that after its execution defendant delivered it to a Miss Gentry, the auditor of the Kings State Bank; that after plaintiff was appointed receiver of the bank he brought suit on the note. On the trial plaintiff introduced the note in evidence and testified. Thereupon defendant testified that about the time the note was executed, Jesse King transferred to him 10 shares of the capital stock of the Kings State Bank, and defendant became and continued to act as one of the board of directors of the bank until it was closed by the auditor of public accounts of the State of Illinois; that from the date of the execution of the note until judgment was entered thereon no demand had been made on him to pay it, nor was any mention made of the existence of the note in any meeting of the board of directors of the bank; and that prior to

judgment it was called to Jesse King's attention that the note was

Jesse King testified that he had been president of the

Kings State Bank from 1901 to 1933; that he had the note in his private safe at the bank and at no time delivered it to anyone representing

the bank. While it is unnecessary for us to pass upon the

credibility of the witnesses, it seems strange that if the note were intended to be Jesse Binga's personally, he would have it made payable to the Binga State Bank and delivered to the Binga State Bank.

Richard H. Mickey testified that he was cashier of the bank after the election of 1930 until it closed; that it was his duty to have possession of the notes of the bank; and that this note was never in his possession.

In spite of the fact, as we have heretofore stated, that the affidavit of merits does not deny either the execution or delivery of the note to the Binga State Bank, defendant persists in arguing that, "where the affidavit of merits denies delivery to plaintiff, the plaintiff is required to make proof of delivery to him." This argument is ostensibly based on the allegation in said affidavit, "that the said Jesse Binga never endorsed or transferred said note to the Binga State Bank." We do not think that this allegation constitutes such a denial of defendant's delivery of the note to the Binga State Bank as required proof by plaintiff of such delivery. Defendant's counsel suggest that on the prior appeal this court "assumed" that plaintiff had legal title to the note. There was no occasion on the former appeal nor is there now to indulge in any such assumption. In the absence of a verified denial of the delivery of the note to the payee, in whose possession it was at the time suit was brought, the law presumes delivery.

Where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is shown. (Ch. 98, par. 36, Cahill's Illinois Revised Statutes.) Delivery will be presumed where the note is no longer in the possession of the party whose name appears on it unless it is expressly denied by verified plea, and when it is plaintiff will be put to the burden of proving delivery as

credibility of the witnesses, it seems strange that if the note
were intended to be James King's personally, he would have it
made payable to the Kings State Bank and delivered to the Kings

State Bank.

Richard H. Mowbray testified that he was cashier of the
bank after the election of 1888 until it closed; that it was his
duty to have possession of the notes of the bank; and that this
note was never in his possession.

In spite of the fact, as we have heretofore stated, that
the affidavit of notice does not deny either the execution or
delivery of the note to the Kings State Bank, defendant persists in
arguing that, "where the affidavit of notice denies delivery to
plaintiff, the plaintiff is required to make proof of delivery to
him." This argument is entirely based on the allegation in said
affidavit, "that the said James King never executed or transferred
said note to the Kings State Bank." We do not think that this

allegation constitutes such a denial of defendant's delivery of the
note to the Kings State Bank as required proof by plaintiff of such
delivery. Defendant's counsel suggest that on the prior appeal this
court "assumed" that plaintiff had legal title to the note. There
was no occasion on the former appeal nor is there now to indulge in
any such assumption. In the absence of a verified denial of the
delivery of the note to the paper, in whose possession it was at the
time suit was brought, the law presumes delivery.

There the instrument is no longer in the possession of a
party whose signature appears thereon, a valid and intentional delivery
by him is presumed until the contrary is shown. (22. 88, par. 32.)

Gallie's Illinois Revised Statutes.) Delivery will be presumed
where the note is no longer in the possession of the party whose name
appears on it unless it is expressly denied by verified plea, and
when it is plaintiff will be put to the burden of proving delivery to

a part of his prima facie case. (Bippus v. Vail, ~~230 Ill. App. 633.~~) It was defendant's name that appeared on the note as its maker and Jesse Binge's name did not appear thereon at all. In the absence of his sworn denial of delivery defendant should not have been allowed to offer evidence on that subject. It was not in issue. We adhere to our opinion on the prior appeal of this cause, General No. 36327, appellate court, first district, wherein we held:

"The plaintiff seeks to reverse the judgment on the ground that the judgment of the court is contrary to law and the evidence. We think there is merit in this contention. Unless the defendant has a defense to the note it is a matter of no consequence who is the equitable owner of the note. Upon this record we would not be warranted in holding that the defendant has shown any defense to the note. The evidence clearly discloses that the note is payable to the Binge State Bank and that plaintiff is the legal holder thereof, and his possession is evidence that the debt mentioned in the note is an existing liability to the person in possession of the note, entitled to receive payment thereof. (Olvin v. Washetich, 326 Ill. 285, 288, and cases cited.) A suit on a promissory note is properly brought in the name of the person in whom the legal title of the note is vested, and it is a matter of no consequence, so far as the defendant is concerned, who may be the equitable owner if he has no defense to it (Caldwell v. Lawrence, 84 Ill. 161; McHenry v. Ridgely, 3 Ill. 309, 310), but this is true only where the defendant has no defense as against the equitable owner. (Faulner v. Gillam, 211 Ill. App. 348.)

"The instant case was decided by the trial court solely upon the theory that the note was the property of Jesse Binge, which fact we do not decide."

Plaintiff was clearly entitled to judgment on this note.

The judgment of the Municipal court is reversed and judgment is entered here in favor of plaintiff and against defendant for \$2,018.75.

JUDGMENT REVERSED AND JUDGMENT HEREIN.

Friend, F. J., and Scanlan, J., concur.

37595

ENTERPRISE TRANSFER COMPANY,
a corporation,

Appellant,

v.

ANNA TRENTADUE FAVIA,

Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

279 I.A. 635⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The Enterprise Transfer Company, plaintiff, filed a complaint in chancery February 1, 1934, to perpetually enjoin Anna Trentadue Favia, her agents and servants, from enforcing the collection of a judgment obtained by her in the Superior court of Cook county (hereinafter for convenience referred to as the Superior court) December 16, 1933, in a common law action entitled "Anna Trentadue Favia v. Enterprise Transfer Company, a corporation, Gen. No. 582826." An order for a temporary injunction was entered February 2, 1934, restraining defendant from enforcing or attempting to enforce her superior court judgment. Upon filing her answer February 17, 1934, defendant presented a motion for dissolution of the temporary injunction and for the dismissal of plaintiff's complaint for want of equity, which motion was sustained by the court in an order entered April 7, 1934. This appeal seeks to reverse that order.

Plaintiff's complaint alleged inter alia that February 7, 1920, one of its trucks was involved in an accident at or near the intersection of Grand and Racine avenues, Chicago, in which defendant then about six years of age was injured; that at that time plaintiff carried liability insurance on the truck in question

СІОВЯ

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

人

1. APPROXIMATELY 1970
1. APPROXIMATELY 1970

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a ball, which is, perhaps, somewhat unusual.

repeatedly to almost himself in 1914, to completely again

from Washington State, but agents are searching the

relaxation of a 10-second exposure by less than the reported amount of

This study (intended to be published) is not yet available.

REPORT ON WORK DURING 1957, IN A SUMMARY FORM

1900-1901

Revised: 10/10/2011

referred to as the "most important" minister, 1981, 11

to determine the extent of the damage to the property.

7-17-67, VI, 1967, 4401, 4402, 4403, 4404, 4405, 4406, 4407, 4408, 4409, 4410, 4411, 4412, 4413, 4414, 4415, 4416, 4417, 4418, 4419, 4420, 4421, 4422, 4423, 4424, 4425, 4426, 4427, 4428, 4429, 4430, 4431, 4432, 4433, 4434, 4435, 4436, 4437, 4438, 4439, 4440, 4441, 4442, 4443, 4444, 4445, 4446, 4447, 4448, 4449, 4450, 4451, 4452, 4453, 4454, 4455, 4456, 4457, 4458, 4459, 4460, 4461, 4462, 4463, 4464, 4465, 4466, 4467, 4468, 4469, 4470, 4471, 4472, 4473, 4474, 4475, 4476, 4477, 4478, 4479, 4480, 4481, 4482, 4483, 4484, 4485, 4486, 4487, 4488, 4489, 4490, 4491, 4492, 4493, 4494, 4495, 4496, 4497, 4498, 4499, 4500, 4501, 4502, 4503, 4504, 4505, 4506, 4507, 4508, 4509, 4510, 4511, 4512, 4513, 4514, 4515, 4516, 4517, 4518, 4519, 4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4528, 4529, 4530, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4540, 4541, 4542, 4543, 4544, 4545, 4546, 4547, 4548, 4549, 4550, 4551, 4552, 4553, 4554, 4555, 4556, 4557, 4558, 4559, 4560, 4561, 4562, 4563, 4564, 4565, 4566, 4567, 4568, 4569, 4570, 4571, 4572, 4573, 4574, 4575, 4576, 4577, 4578, 4579, 4580, 4581, 4582, 4583, 4584, 4585, 4586, 4587, 4588, 4589, 4590, 4591, 4592, 4593, 4594, 4595, 4596, 4597, 4598, 4599, 4600, 4601, 4602, 4603, 4604, 4605, 4606, 4607, 4608, 4609, 4610, 4611, 4612, 4613, 4614, 4615, 4616, 4617, 4618, 4619, 4620, 4621, 4622, 4623, 4624, 4625, 4626, 4627, 4628, 4629, 4630, 4631, 4632, 4633, 4634, 4635, 4636, 4637, 4638, 4639, 4640, 4641, 4642, 4643, 4644, 4645, 4646, 4647, 4648, 4649, 4650, 4651, 4652, 4653, 4654, 4655, 4656, 4657, 4658, 4659, 4660, 4661, 4662, 4663, 4664, 4665, 4666, 4667, 4668, 4669, 4670, 4671, 4672, 4673, 4674, 4675, 4676, 4677, 4678, 4679, 4680, 4681, 4682, 4683, 4684, 4685, 4686, 4687, 4688, 4689, 4690, 4691, 4692, 4693, 4694, 4695, 4696, 4697, 4698, 4699, 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708, 4709, 4710, 4711, 4712, 4713, 4714, 4715, 4716, 4717, 4718, 4719, 4720, 4721, 4722, 4723, 4724, 4725, 4726, 4727, 4728, 4729, 4730, 4731, 4732, 4733, 4734, 4735, 4736, 4737, 4738, 4739, 4740, 4741, 4742, 4743, 4744, 4745, 4746, 4747, 4748, 4749, 4750, 4751, 4752, 4753, 4754, 4755, 4756, 4757, 4758, 4759, 4760, 4761, 4762, 4763, 4764, 4765, 4766, 4767, 4768, 4769, 4770, 4771, 4772, 4773, 4774, 4775, 4776, 4777, 4778, 4779, 4780, 4781, 4782, 4783, 4784, 4785, 4786, 4787, 4788, 4789, 4790, 4791, 4792, 4793, 4794, 4795, 4796, 4797, 4798, 4799, 4800, 4801, 4802, 4803, 4804, 4805, 4806, 4807, 4808, 4809, 4810, 4811, 4812, 4813, 4814, 4815, 4816, 4817, 4818, 4819, 4820, 4821, 4822, 4823, 4824, 4825, 4826, 4827, 4828, 4829, 4830, 4831, 4832, 4833, 4834, 4835, 4836, 4837, 4838, 4839, 4840, 4841, 4842, 4843, 4844, 4845, 4846, 4847, 4848, 4849, 4850, 4851, 4852, 4853, 4854, 4855, 4856, 4857, 4858, 4859, 4860, 4861, 4862, 4863, 4864, 4865, 4866, 4867, 4868, 4869, 4870, 4871, 4872, 4873, 4874, 4875, 4876, 4877, 4878, 4879, 4880, 4881, 4882, 4883, 4884, 4885, 4886, 4887, 4888, 4889, 4890, 4891, 4892, 4893, 4894, 4895, 4896, 4897, 4898, 4899, 4900, 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4908, 4909, 4910, 4911, 4912, 4913, 4914, 4915, 4916, 4917, 4918, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, 4930, 4931, 4932, 4933, 4934, 4935, 4936, 4937, 4938, 4939, 4940, 4941, 4942, 4943, 4944, 4945, 4946, 4947, 4948, 4949, 4950, 4951, 4952, 4953, 4954, 4955, 4956, 4957, 4958, 4959, 4960, 4961, 4962, 4963, 4964, 4965, 4966, 4967, 4968, 4969, 4970, 4971, 4972, 4973, 4974, 4975, 4976, 4977, 4978, 4979, 4980, 4981, 4982, 4983, 4984, 4985, 4986, 4987, 4988, 4989, 4990, 4991, 4992, 4993, 4994, 4995, 4996, 4997, 4998, 4999, 5000, 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014, 5015, 5016, 5017, 5018, 5019, 5020, 5021, 5022, 5023, 5024, 5025, 5026, 5027, 5028, 5029, 5030, 5031, 5032, 5033, 5034, 5035, 5036, 5037, 5038, 5039, 5040, 5041, 5042, 5043, 5044, 5045, 5046, 5047, 5048, 5049, 5050, 5051, 5052, 5053, 5054, 5055, 5056, 5057, 5058, 5059, 5060, 5061, 5062, 5063, 5064, 5065, 5066, 5067, 5068, 5069, 5070, 5071, 5072, 5073, 5074, 5075, 5076, 5077, 5078, 5079, 508

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

three and of barbed wire was not used, which was not done

in an order dated April 7, 1951. This order was issued by the

Volume 2481

U.S. DEPARTMENT OF THE INTERIOR

7. 1982, one of the trucks was involved in an accident on near

the intersection of Grand and Boone avenues, Chicago, in which

Weberbauer (non-ovine) are present at low levels; that is they

... ..

with the Belt Automobile Indemnity Association (hereinafter referred to as the Belt Association) and made a report to it of the accident; that plaintiff was not informed at the time of the specific disposition made by the Belt Association of the claim in behalf of defendant, whose then name was Anna Trentadue, and knew nothing further of such claim until it was served with a summons to appear as defendant at the September, 1932, term of the superior court in the cause in that court heretofore referred to; that when such summons was received plaintiff was not informed and did not know that defendant here, (plaintiff there), Anna Trentadue Favia, was the same Anna Trentadue who had been injured in the accident of February 7, 1920, and, because of the long lapse of time, had no reason to suspect that she was; that an investigation disclosed that the superior court action was instituted by the same person who was injured in the aforesaid accident, after she had attained her majority and had married one Joseph Favia, and was predicated upon that accident; that in 1930 the business of the Belt Association was purchased by the Belt Casualty Company (hereinafter referred to as the Belt Company), and that after the said summons was served upon plaintiff in the superior court action it encountered great difficulty with the latter insurance company due to the fact that twelve years had intervened between the date of the accident and the commencement of the superior court action; that plaintiff immediately notified the Belt Company of the pendency of the superior court action and that company advised plaintiff on behalf of itself and the Belt Association that it could find no record of any claim ever having been presented to it on behalf of Anna Trentadue against the Enterprise Transfer Company, that no record could be found of any policy of liability insurance having been issued to the Enterprise Transfer Company, and that it refused to defend the suit and disclaimed any liability in connection therewith.

Plaintiff's bill further alleged that it engaged its

with the Bell Telephone Association (Association referred to as the Bell Association) and made a report as to the accident; that Plaintiff was not informed at the time of the specific allegations made by the Bell Association of the claim in behalf of defendant, whose then name was Anna Trenchard, and knew nothing further of such claim until it was served with a summons to appear on January 12, 1932, when of the superior court in the case in that court heretofore referred to; that when such summons was received Plaintiff was not informed and did not know that defendant here, (Plaintiff here), Anna Trenchard Taylor, was the same Anna Trenchard who had been injured in the accident at February 7, 1930, and, because of the long lapse of time, had no reason to suspect that she was; that no investigation disclosed that the superior court action was instituted by the same person who was injured in the above accident, after she had obtained her majority and had married one Joseph Taylor and was residing upon that accident; that in 1930 the business of the Bell Association was purchased by the Bell Telephone Company, Inc., and that after the said purchase was made Plaintiff in the superior court action is concerned that Plaintiff with the latter insurance company due to the fact that twelve years had intervened between the date of the accident and the commencement of the superior court action; that Plaintiff immediately notified the Bell Company of the purchase of the superior court action and was promptly advised that Plaintiff was not in their and the Bell Association that it could then be shown that Plaintiff was having been prevented to it on behalf of the Trenchard against the Insurance Trustee Company, that no record could be found at any office of Plaintiff Insurance having been issued to the Insurance Trustee Company, and that it refused to defend the suit and Plaintiff any liability in connection therewith.

own counsel, the superior court action was tried and judgment was entered against it December 16, 1933, for \$1,900 upon the verdict of a jury; that immediately after the entry of the judgment against it plaintiff again presented the facts to the Belt Company, which reiterated its position that neither it nor the Belt Association ever issued a policy covering the claim, that it was not liable, that it knew nothing of the claim and that it had never compromised nor settled it; that because of financial difficulties a receiver was appointed for the Belt Company early in January, 1934, who thereafter assumed charge of its affairs; that it had searched the records of the Probate court of Cook county to ascertain if any minor estate on behalf of Anna Trentadue had been created and could find none; and that it had been unable to secure any information directly or indirectly from the Belt Company or from any other source with reference to the claim of Anna Trentadue or the aforesaid policy of liability insurance issued to it by the Belt Association.

The bill of complaint also averred that plaintiff finally, after the expiration of the term at which the superior court judgment was entered, received information that shortly after the date of the accident, defendant, with her parents, moved from Chicago to Fort Wayne, Allen county, Indiana; that in the year 1921, upon his petition, one Frank M. Hogan, a licensed practicing attorney of Fort Wayne, Indiana, was appointed guardian of the person and the estate of the minor, Anna Trentadue, by the Probate division of the Superior court of Allen county, Indiana, (hereinafter referred to as the probate court); that, thereafter Hogan filed a petition in said court, setting forth that his ward was a minor child, that she had been injured by plaintiff's truck February 7, 1920, in the city of Chicago, that she had fully recovered from her injuries, that the Belt Association carried liability insurance coverage on plaintiff's truck and that it had offered \$400 in full settlement of Anna Trentadue's claim

against plaintiff, the Enterprise Transfer Company; that said probate court authorized Hogan as guardian to accept the offer of settlement of the Belt Association and execute a release completely discharging plaintiff from Anna Trentadue's claim against it as a result of said accident; that the Belt Association paid \$400 to Hogan, who executed such release; that the minor's estate is still open, the guardian's complete and final account of the disposition of the funds in his hands as such guardian never having been filed; that Anna Trentadue, the minor in estate No. 1396 in the probate court, and Anna Trentadue Favia, plaintiff in the action in the superior court, in which the judgment sought to be enjoined was entered, are one and the same person; that the Enterprise Transfer Company, defendant in the action in the superior court and the Enterprise Transfer Company, in whose behalf the settlement and the release of Anna Trentadue's claim was authorized by the probate court, are one and the same corporation; that it was unable to present the aforesaid settlement and release as a defense to the action in the superior court because, although it exercised due diligence, it did not acquire knowledge of the proceeding in the probate court until after the cause was tried and judgment entered in the superior court and the term had expired at which it had been entered; that its inability to secure information sooner concerning said release was due to the long lapse of time from February 7, 1929, when the accident occurred, to September, 1932, when the summons in the action in the superior court was returnable, to the purchase of the Belt Association by the Belt Company and the statement of the latter company that it had no record of any claim of Anna Trentadue against plaintiff or of any liability coverage issued to plaintiff by the Belt Association, to the fact that plaintiff had no record of the claim, policy or anything pertaining to the accident, and to the fact that it had no knowledge of defendant's removal to Indiana; that January 25, 1934, it presented its sworn petition to

the Superior court of Cook county containing all the facts heretofore set forth, and moved that court to vacate and set aside the judgment entered therein against it December 16, 1933; that upon the hearing on said motion the trial judge informed plaintiff (defendant there) that it lacked jurisdiction to vacate the judgment "for the reason that the term time had passed * * * he could grant no relief," but allowed plaintiff to file its petition in support of such motion; that defendant (plaintiff there) and her agents knew of the proceeding in and the approval of the aforesaid release of the Enterprise Transfer Company by the probate court and fraudulently concealed such facts from plaintiff and the trial judge in the cause tried in the superior court wherein she secured the judgment against plaintiff; and that, unless a perpetual injunction is issued to restrain the enforcement of such judgment, plaintiff will suffer irreparable damage. Plaintiff's bill concluded with a prayer for a perpetual injunction to restrain the enforcement of defendant's superior court judgment.

As heretofore stated plaintiff secured a temporary injunction February 2, 1934, restraining defendant from enforcing her judgment, and February 17, 1934, defendant presented her motion for a dissolution of such temporary injunction and for the dismissal of plaintiff's bill of complaint. On the same day defendant filed her answer.

Inasmuch as we have fully set forth the relations of the parties as alleged in plaintiff's bill of complaint, we deem it unnecessary to state the averments of defendant's answer other than that she charges that she was seriously and permanently injured as a result of the accident in question; that neither she, her parents nor anyone else in her behalf received the \$400 or any part thereof paid for the alleged settlement of her claim and for the release discharging plaintiff from liability on account of same; that the amount of the alleged settlement was wholly inadequate to compensate her for

The superior court of Cook County containing all the facts hereinafore
set forth, and moved that court to vacate and set aside the judgment
against Plaintiff against its judgment of December 16, 1935, and upon the finding
on said motion the court judge entered judgment (defendant's name)
that it lacked jurisdiction to vacate the judgment for the reason
that the law does not permit - - - as would appear on review, but
affirmed Plaintiff's motion in this the Plaintiff is advised of such motion
that defendant (Plaintiff's name) and her agents knew of the proceedings
in and the approval of the allegedly release of the superior court
thereby by the superior court and intentionally concealed such facts
from Plaintiff and the trial judge in the same trial in the superior
court wherein the court the judgment against Plaintiff was made,
whereby a prejudicial information is shown to exist in the defendant
as well as Plaintiff's motion will set aside judgment for Plaintiff's name - This
Plaintiff will maintain with a proper law a prejudicial information as
wherein the defendant of Plaintiff's motion against Plaintiff's name -
as heretofore stated Plaintiff secured a temporary in-
junction February 2, 1936, restraining defendant from entering her
judgment, and February 17, 1936, defendant presented her motion for a
dissolution of such temporary injunction and for the dismissal of
Plaintiff's bill as complaint. On the same day defendant filed her
answer.

Inasmuch as we have fully set forth the relations of the
parties as alleged in Plaintiff's bill of complaint, we deem it
unnecessary to state the contents of defendant's answer other than
that she alleges that she was seriously and permanently injured as
a result of the accident in question that neither she, her parents
nor anyone else in her family received the full or any part thereof
paid for the alleged settlement of her claim and for the release dis-
charged Plaintiff from liability as alleged at which time the motion
of the alleged settlement was wholly made to compensate her for

her injuries; that neither she, her parents nor anyone acting in her behalf had any knowledge of the creation of the minor's estate in her name in the probate court or of the appointment of Hogan as the guardian of her person and her estate; that Hogan's petition for appointment as guardian of her person and her estate, his appointment as such, his petition for leave to settle her claim, the order of court authorizing the settlement for \$400 and Hogan's release of her claim for that amount in the proceeding in the probate court, all transpired without the knowledge, consent, approval or authority of defendant or her parents, and with knowledge that defendant had a meritorious cause of action; that the Belt Association was plaintiff's agent in the matter of the alleged settlement and release, and plaintiff is chargeable with its agent's knowledge of the facts pertaining to such settlement and release; that plaintiff failed to use due diligence in that it did not present its alleged defense of the aforesaid settlement and release in the trial of defendant's action against it in the superior court; and that she had no knowledge of the guardianship proceeding in the probate court when she filed her suit in the superior court.

Defendant filed with her answer the affidavit of her father, Ralph Trentadue, which asserted that he was not acquainted with Hogan; that neither he, his wife, nor any member of his family had either personally or otherwise engaged or authorized Hogan to act as guardian for his daughter, then Anna Trentadue; that he did not engage any person to handle any claim for her against plaintiff or any insurance company; that he had no knowledge that any such claim was being made against plaintiff; and that he was not aware of the proceeding in the probate court or of the approval of the alleged settlement and release of his daughter Anna's claim by that court.

Plaintiff's reply to defendant's answer alleged inter alia that defendant and her parents had knowledge of its policy of liability

has injuries; that neither she, her husband nor anyone acting in her behalf has any knowledge of the execution of the minor's claim in her name in the probate court or of the appointment of Hagan as the guardian of her person and her estate; that Hagan's petition for appointment as guardian of her person and her estate, his appointment as such, his petition for leave to receive her claim, the order of the court authorizing the settlement for \$400 and Hagan's release of her claim for that amount in the proceedings in the probate court, all investigated without the knowledge, consent, approval or authority of defendant or her parents, and with knowledge that defendant had a petitory cause of action; that the said settlement was plaintiff's agent in the matter of the alleged settlement and release, and plaintiff is chargeable with the agent's knowledge of the facts pertaining to such settlement and release; that plaintiff failed to use due diligence in that it did not present the alleged defense of the alleged settlement and release to the trial of defendant's action against it in the superior court and that she had no knowledge of the proceedings with respect to the probate court when she filed her suit in the superior court.

Defendant filed with her answer the affidavit of her father, Ralph Thompson, which recited that he was not acquainted with Hagan; that neither he, his wife, nor any member of his family had either personally or otherwise engaged or authorized Hagan to act as guardian for the plaintiff, that said statement, that on his last inquiry and review he handled any claim for her against plaintiff or any insurance company, that he had no knowledge that any such claim was being made against plaintiff; and that he was not aware of the proceedings in the probate court or of the approval of the alleged settlement and release of his daughter Anna's claim by that court.

Plaintiff's reply to defendant's answer alleged that she had knowledge of the policy of plaintiff

insurance and of the proceedings in the probate court; that said court had jurisdiction of defendant and of her estate, and that its orders are in full force and effect; that the payment of \$400 in plaintiff's behalf to Hogan, defendant's guardian, and the execution of the release of plaintiff's liability by him is a complete bar to the right of defendant to any recovery under the judgment obtained by her in the superior court, and that defendant is bound by the orders of the probate court; that it was not guilty of laches or negligence, but used due diligence in endeavoring to obtain information concerning Anna Trentadue Favia and to obtain the records and files pertaining to the settlement of her claim against plaintiff in the probate court so that same might be presented as a defense to her action in the superior court; and that for the reasons heretofore stated in its complaint it was prevented from so doing.

On the hearing of her motion to dissolve the temporary injunction and to dismiss plaintiff's complaint, defendant introduced in evidence her sworn answer, the affidavit of her father, Ralph Trentadue, and certain letters, the contents of which it is unnecessary to recite. Plaintiff introduced in evidence its sworn complaint, its sworn reply to defendant's answer, and an authenticated and exemplified copy of the proceedings in the probate court, including Hogan's petition for leave to compromise the minor's claim for \$400. Attached to this petition were three letters, one from H. H. Mudd of the claim department of the Belt Association, offering \$400 in settlement of defendant's claim, one from an attorney for the Legal Aid Bureau of the United Charities of Chicago, refusing to recommend the acceptance of the Belt Association's offer of \$400 in settlement of said claim, and a subsequent letter written by the general superintendent of said Legal Aid Bureau to Hogan, recommending the acceptance of the Belt Association's offer of settlement. Certain other letters were also received in evidence, which have no bearing

insurance and of the proceedings in the probate court; that said court had jurisdiction of defendant and of her estate, and that the orders are in full force and effect; that the payment of \$1000 is Plaintiff's debt to Defendant, Defendant's guardian, and the execution of the release of Plaintiff's liability by him to a complete bar to the right of defendant to any recovery under the judgment obtained by her in the superior court, and that defendant is bound by the orders of the probate court; that it was not guilty of fraud or negligence, but that due diligence in endeavoring to obtain information concerning the same was exercised by it, and that it was not negligent in failing to the settlement of her claim against Plaintiff in the probate court so that same might be presented as a defense to her action in the superior court; and that for the reasons mentioned above in the complaint it was presented that it was being.

On the hearing of her motion to dissolve the temporary injunction and to dismiss Plaintiff's complaint, Defendant introduced in evidence her own answer, the exhibits of her father, Ralph Thompson, and certain letters, the contents of which it is unnecessary to recite. Plaintiff introduced in evidence in answer thereto, the copy of Defendant's answer, and an authenticated and certified copy of the proceedings in the probate court, showing that Plaintiff had introduced in evidence the same's claim for \$1000. Defendant so said Plaintiff was those letters, and from W. H. that of the claim dependent of the said association, showing that the evidence of defendant's claim, one from an attorney for the Legal Aid Bureau of the United States of America, referring to the association of the said association's letter of 1900 in evidence of said claim, and a subsequent letter received by the Legal Aid Bureau of said Legal Aid Bureau so before, recommending the payment of the said association's letter of settlement. Certain other letters were also introduced in evidence, which have been

on what we consider to be the real issue in this cause.

It is earnestly urged that the approval by the probate court of the settlement of defendant's claim against plaintiff on account of the accident in question, and the authorization of the release of plaintiff from liability on such claim upon the payment of \$400 by the Belt Association, constituted a defense to defendant's action in the superior court and a complete bar to her recovery against plaintiff in that action, and that plaintiff cannot be charged with negligence in failing to present this defense to defendant's action in the superior court inasmuch as it was diligent in its effort to obtain information or knowledge of the proceeding in the probate court approving the settlement and release, but same was unavailing for the reasons set forth in its complaint until after the expiration of the term in which judgment was entered against it in the superior court.

The Belt Association was plaintiff's agent in effecting the purported settlement and release, and it is sufficient to state in answer to the^{above} contention that the law imputes to the principal, and charges him with, all notice or knowledge relating to the subject matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority. This rule does not depend upon the fact that the agent had disclosed the knowledge or information to his principal, but the law conclusively presumes that he has done so and charges the principal accordingly. When once notice has attached the fact that there is no occasion to act upon it until after the agent through whom it was acquired has ceased to be such, or has changed his position, will be immaterial. This is equally true if information once had is forgotten or unavailable or the principal has no longer any knowledge of the facts or record of them. (2 Mechem on Agency, sec. 1813, page 1397.)

So in this case plaintiff is chargeable with knowledge of the alleged settlement and release as of the time same was made in

up and we consider to be the best thing in this country.

It is generally agreed that the approval by the people

of the proposed amendments to the constitution is

an indication of the feeling in the country, and the satisfaction of

the people of the country is a very good thing.

payment of \$100 by the State Association, constituted a defense to

defendant's action in the superior court and a complete bar to her

recovery against plaintiff in that action, and that plaintiff cannot

be charged with negligence in failing to present this defense to

defendant's action in the superior court inasmuch as it was diligent

in the effort to obtain information on knowledge of the proceedings in

the private court approving the settlement and release, but that was

unavailing for the reasons set forth in the complaint until after the

expiration of the term in which judgment was entered against it in

the superior court.

The State Association was plaintiff's agent in effecting

the proposed settlement and release, and it is well known to this

in answer to the ^{above} question that the law imputed to the principal.

and charges him with all notice or knowledge relating to the sub-

ject matter of the agency which the agent acquires or retains while

acting as such agent and within the scope of his authority. This

rule does not depend upon the fact that the agent had disclosed the

knowledge or information to his principal, but the law conclusively

presumes that he has done so and charges the principal accordingly.

When once notice has attached the fact that there is no occasion to

act upon it until after the agent through whom it was acquired has

ceased to be such, or has changed his position, will be immaterial.

It is equally true if information once had is forgotten or un-

available to the principal and no action was instituted at the time

at least of time. (2 Washon on Agency, sec. 3813, para. 1337.)

So in this case plaintiff is chargeable with knowledge of

the alleged settlement and release as of the time same was made by

its behalf by the Belt Association and to be of any avail it was incumbent upon it to present same as a defense to defendant's action in the superior court. Plaintiff who seeks to retain the benefit of the settlement claimed to have been made in its behalf by its agent cannot be heard to say that it has or had no knowledge of such settlement. Neither plaintiff's alleged diligent but unavailing search for information concerning the settlement and release of defendant's claim, the sale of the Belt Association's business, the failure and refusal of its successor, the Belt Company, to cooperate with plaintiff or to recognize its obligation as insurer and to furnish it with information as to defendant's claim and the settlement of same, the long interval that elapsed between the date of the accident and the commencement of defendant's action in the superior court, defendant's removal to Indiana shortly after the accident nor any of the other matters alleged and shown in its attempt to excuse its failure to secure information of the alleged settlement and release in time to present same as a defense to defendant's superior court action can be held legally sufficient to overcome the presumption that plaintiff's agent's knowledge of the settlement and release was its knowledge. Charged with this knowledge, as it was, plaintiff was bound to assert such defense in defendant's action in the superior court or not at all.

Under this rule, as established by an unbroken current of authority, plaintiff is precluded from predicating a complaint in equity to enjoin the enforcement of defendant's superior court judgment upon its lack of knowledge of matters of which the law conclusively presumes it to have knowledge.

We find no reversible error in the record. The order of the circuit court dissolving the temporary injunction and dismissing plaintiff's complaint for want of equity is therefore affirmed.

AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

its benefit by the Belt Association and so be of any avail it was
impossible upon it to present same as a defense to defendant's
action in the superior court. Plaintiff who seeks to retain the
benefit of the settlement claimed to have been made in the benefit
by the agent cannot be heard to say that it was of his knowledge
of such settlement. Neither plaintiff's alleged rights but un-
availing search for information concerning the settlement and release
of defendant's claim, the sale of the Belt Association's business,
the failure and refusal of its officers, the Belt Company, to co-
operate with plaintiff or to recognize the obligation as insurer and
to furnish it with information as to defendant's claim and the
settlement of same, the long interval that elapsed between the date
of the accident and the commencement of defendant's action in the
superior court, defendant's failure to introduce timely after the
accident nor any of the other matters alleged and shown in its
attempt to excuse its failure to secure information of the alleged
settlement and release in time to present same as a defense to
defendant's superior court action can be held legally sufficient to
prevent the presumption that plaintiff's agent's knowledge of the
settlement and release was his knowledge. Charged with this knowl-
edge, as it was, plaintiff was bound to assert such defense in
defendant's action in the superior court or not at all.
Under this rule, as established by an unbroken current of
authority, plaintiff is precluded from presenting a complaint in
order to obtain the enforcement of defendant's superior court judg-
ment upon the lack of knowledge of release of which the law re-
quires plaintiff to have knowledge.
It is a plain and reversible error in the record. The order of
the circuit court dissolving the temporary injunction and dismissing
plaintiff's complaint for want of equity is therefore affirmed.
Affirmed.
Thompson, J., and Seaborn, J., concur.

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37622

WILLIAM BILLOS,
Defendant in Error,

v.

LADISLAV (alias Walter) POHL
and ANNA POHL,
Plaintiffs in Error.

ERROR TO SUPERIOR

COURT, COOK COUNTY.

279 I.A. 636¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse an order entered by the trial court September 2, 1932, denying defendants' motion to vacate a judgment by confession for \$2,500 entered against them May 18, 1932.

Defendants' verified petition to vacate the judgment, filed September 1, 1932, is as follows:

"Your petitioners, Walter Pohl, also known as Ladislav Pohl, and Anna Pohl, respectfully represent unto this honorable court that they are the defendants in the above entitled cause; that on May 18, 1932, a judgment by confession upon a note was entered in said cause in favor of the plaintiff and against your petitioners for \$2500 including \$200 attorney's fees; that a writ of execution was issued thereon on July 27, 1932, and was served upon your petitioners on August 24, 1932; that on August 20, 1932, your petitioners received a notice by mail from the sheriff's office of Cook county stating that on September 6, 1932, by virtue of an execution issued in favor of one William Billos he would sell Lots 22 and 23 in Block 5 and Lots 47 and 48 in Block 22 all in Grant Locomotive Works Addition to Chicago in Cook County; that your petitioners are unable to read the English language and therefore immediately obtained translation of said notice and caused an inquiry to be made into the nature of the above entitled suit; that your petitioners are the owners of said Lots 47 and 48 and hold said Lots 22 and 23 in trust for one Thomas Mynar and Josephine Mynar; that your petitioners did not know of this cause until they had an opportunity to have said notice and summons (execution) looked into by counsel and in their depleted financial circumstances have used all diligence to present this petition.

"Your petitioners further allege that they have a meritorious defense to the plaintiff's claim; that the nature of your petitioners' defense to the plaintiff's claim is as follows:

"That the signatures of your petitioners to the note herein sued upon were fraudulently obtained from your petitioners;

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WILLIAM H. HARRIS,
Attorney at Law

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Attorney at Law

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Attorney at Law

that prior to the time of the execution of said note, your petitioners had been informed by said Thomas Mynar that said Lots 22 and 23, (belonging to said Thomas Mynar and Josephine Mynar, his wife), had been conveyed to your petitioners for purposes that your petitioners did not understand at the time and your petitioners were informed by said Thomas Mynar that it would be necessary for your petitioners to sign some documents reconveying said premises to said Thomas Mynar and Josephine Mynar, his wife; that on or about May 3, 1930, said Josephine Mynar came to the home of your petitioners and introduced them to one James Borna, who your petitioners were informed by said Josephine Mynar was an attorney and desired the signature of your petitioners to several documents; that said Thomas and Josephine Mynar were old and trusted acquaintances of your petitioners and your petitioners were unable to read said documents, being unable to read the English language, and did not understand the documents or know their meaning; that your petitioners requested the nature of said documents and were informed by said Josephine Mynar, said James Borna acquiescing therein, that said documents merely pertained to said Lots 22 and 23, (the property of said Thomas and Josephine Mynar), so held in trust as aforesaid; and your petitioners solely relied upon said information and acquiescence and believed that said documents were necessary merely for the reconveyance of said Lots 22 and 23; and for that purpose and no other purpose signed the same. (*Italics ours.*)

"Your petitioners further allege that since the service of said execution upon them they have been informed that their said supposed reconveyance of said lots so held in trust was in fact the execution of the note herein sued on; that said note was obtained by fraud as aforesaid; that your petitioners are not indebted to the plaintiff in any sum; that at no time have they received, or has any one in their behalf received, or obtained any money from the plaintiff, William Billoe, or anyone acting in his behalf, or from Thomas Mynar, Josephine Mynar, or James Borna; and that at no time prior to the service of the execution herein, as aforesaid, had any demand been made upon them for the payment of any money for or on account of the note sued upon herein.

"Wherefore, your petitioners pray that an order be entered in the above entitled cause vacating said judgment of May 18, 1932; that your petitioners be allowed to appear and defend herein; and that an order be issued herein staying the proceedings now pending herein for the sale of your petitioners' said real property and staying the issuance of further writs herein until a hearing can be had in this cause."

Defendants contend that the facts set forth in their petition constitute fraud and circumvention in obtaining the execution by them of the note in question.

Section 10 of the Negotiable Instruments Act (paragraph 11, chapter 86, Cahill's Revised Statutes of 1933) provides:

"If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument."

The facts disclosed by defendants' petition show that they were induced to execute the note under the belief that it was an instrument of an entirely different character. This clearly makes such a case of fraud and circumvention in obtaining the making or executing of the note as the statute contemplated and it is pleadable in bar to an action brought on the note by any assignee of it. It cannot be said as a matter of law that defendants' petition shows such negligence on their part as avoids the defense. It would be a question of fact, subsequently to be passed upon and determined, whether defendants were guilty of such negligence in executing the note and allowing it to go into circulation as should preclude them from setting up the defense.

(Munson v. Nichols, 62 Ill. 111.)

A motion to set aside a judgment by confession is addressed to the equitable discretion of the court and the question is whether there are equitable reasons why the judgment should be opened up to let in a defense. If there is a showing to the court of facts from which it may fairly be seen that there is a good and sufficient defense on the merits of the case, then the motion should be allowed.

(Murphy v. Schoch, 135 Ill. App. 550.)

While it is true as a general rule, where one of two persons must suffer loss, that he whose negligent conduct made it possible for the loss to occur must bear it, that rule cannot be invoked to deprive defendants of their preferred defense. It ^{only} could be applied if on the trial of this cause it can then be shown that defendants were fairly chargeable with negligence. If the

"If any fraud or circumvention be shown in obtaining the making or execution of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar of any action to be brought on any such instrument or evidence taken or relied on by the party committing such fraud or circumvention, or any assignee of such instrument."

The facts disclosed by defendant's petition show that

they were intended to enable the note under the belief that it

was an instrument of an entirely different character. This

clearly makes such a case of fraud and circumvention in obtaining

the making or execution of the note as the statute contemplated

and it is plausible in law to be an action brought on the note by

any assignee of it. It cannot be said as a matter of law that

defendant's petition shows such negligence on their part as excludes

the defense. It would be a question of fact, subsequently to be

presented upon and determined, whether defendant were guilty of such

negligence in executing the note and allowing it to go into cir-

culation as should preclude them from setting up the defense.

[REDACTED]

A motion to set aside a judgment by confession is addressed

to the equitable discretion of the court and the question is whether

there are equitable reasons why the judgment should be set aside or

not in a defense. It there is a showing to the court of facts from

which it may fairly be seen that there is a good and sufficient

defense on the merits of the case, then the motion should be allowed.

[REDACTED]

While it is true as a general rule, where one of two

parties must suffer loss, that the other party's interest must be

possible for the loss to occur must bear it, that rule cannot be

invoked to deprive defendant of their preferred defense. It

only applied it on the trial of this cause it can then be shown

that defendant were fairly chargeable with negligence. If the

defense set forth in defendants' petition is true, plaintiff is not entitled to a judgment and it would be manifestly unjust that he should have it.

We are of the opinion that the trial court should have opened the judgment, allowing it to stand as security for the amount due, if any, and permitted the defendants to appear and defend.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Friend, P. J., and Scanlan, J., concur.

37637

FRANK TAGLIA, administrator
of the estate of FIORENTINA
TAGLIA, deceased,
Appellee,

v.

SOCIETA AGRICOLA OPERA S.
CRISTOFORO E. MARIA VERGINE
INCORPORATA DI RIGIGLIANO,
Appellant.

104 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

279 I.A. 636²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, the husband of Fiorentina Taglia, deceased, brought this action in contract as the administrator of her estate to recover a \$500 mortuary benefit due from defendant by reason of its agreement to pay that amount to her family in the event of her death. During the course of the trial by the court without a jury a partial judgment for \$150 entered against defendant was satisfied and the cause proceeded as to the balance. At the conclusion of the hearing the trial court found the issues for plaintiff, assessed his damages at \$350 and entered judgment against defendant for that amount. This appeal followed.

The cause was tried upon a stipulation of facts, the salient portions of which are that Fiorentina Taglia died December 9, 1932; that prior to and at the time of her death she was a member in good standing and entitled to all the rights and benefits provided by the by-laws of defendant society; that upon her death plaintiff became entitled to the mortuary benefit provided by such by-laws then in force and effect; that no written contract or certificate was executed between the parties; that defendant society is an Illinois corporation operating pursuant to its charter; that on and prior to December 4,

1936

THE COURT, in its opinion, is of the opinion that the plaintiff is entitled to recover the sum of \$1000.00, and the costs of this action.

IT IS ORDERED that the plaintiff recover the sum of \$1000.00, and the costs of this action, from the defendant.

WITNESSED my hand and the seal of the Court at Chicago, Illinois, this 10th day of December, 1936.

JOHN J. LEWIS, Judge of the Court.

Plaintiff, the husband of Florence Taylor, deceased, brought this action in contract as the administrator of her estate to recover a \$1000.00 mortgage benefit due from defendant by reason of its agreement to pay that amount to her family in the event of her death. During the course of the trial by the court without a jury a verdict judgment was rendered against defendant for the sum of \$1000.00 and the costs of this action, and the same proceeded as to the balance. At the conclusion of the hearing the trial court found the issues for plaintiff, assessed his damages at \$1000.00 and entered judgment against defendant for that amount. This appeal follows.

The case was tried upon a stipulation of facts, the relevant portions of which are that Florence Taylor died December 4, 1935; that prior to and at the time of her death she was a member in good standing and entitled to all the rights and benefits provided by the by-laws of defendant society; that upon her death plaintiff became entitled to the mortgage benefit provided by such by-laws that in fact and effect; that no written contract or certificate was executed between the parties; that defendant society is an Illinois corporation having payment in its charter; that on and prior to December 4,

1932, the family of a deceased member of the society was entitled to receive under its by-laws \$500 as a mortuary benefit; and that of the by-laws in effect prior to December 4, 1932, the following are pertinent to the issues in this cause:

"Article 29. The mortuary tax per capita will be fixed by the assembly at the first meeting in December for the following year. This quota may vary annually, according to the number of members, due to the fact that the family should receive Five Hundred Dollars (\$500.00).

"Article 30. The mortuary benefit and the tax therefor are equal in both sexes, the latter to be paid in advance.

"Whoever is in arrears in funeral payments, even though currently paid up with monthly dues, shall not have any right to a mortuary benefit. The society shall pay the funeral benefit (meaning mortuary benefit) not later than sixty (60) days, however in case of misfortune, which may cause more than one death, and any other exceptional cases, the society reserves to itself the right to adopt those provisions necessary for the protection and existence of the society."

It was further stipulated that at a certain meeting of the society held November 6, 1932, and of its council held November 20, 1932, both after due notice, a certain new by-law was proposed and recommended for adoption by the society; that at a regular and special meeting held December 4, 1932, pursuant to notice to all its members, including Fiorentina Taglia, the society adopted the recommendation of its council, and the members present voted unanimously to amend article 29 of its by-laws to read as follows:

"Monthly payments, fifty cents, funeral payments, one dollar per member, payable in advance. Benefits: sick benefit five dollars per week for thirteen weeks. Mortuary benefit - one dollar per member, the total number of current members being the total number of dollars, effective with the meeting of December 4, 1932."

Attached to the stipulation were the charter of the society, copies of the notices of the various meetings and copies of the minutes detailing the discussion on amended article 29 of the by-laws prior to its enactment. The discussion was concerned principally with the necessity for adopting the amended by-law for the protection and continued existence of the society.

The main question presented for our determination on this appeal is whether defendant society, in the absence of an express provision specifically reserving to itself the right to do so, had

the power, through subsequently enacted by-laws, to divest a member of vested rights acquired by her under by-laws in force when she joined the society and for a long period thereafter, and thus reduce the amount payable as a mortuary benefit without the consent of the member. In other words could this society as a matter of expediency and protection, or even to safeguard its very existence, legally enact a by-law that would take away the mortuary benefit of \$500 that it had promised to pay to her family upon her death under a by-law in existence when the insured joined the society and for thirty-five years thereafter, and substitute therefor a mortuary benefit of \$151 under the terms of the amended by-law?

It is not claimed that deceased consented to be bound by this amended by-law, and it is conceded, in effect, that such change in the by-law is without binding legal force upon plaintiff unless sanction for it can be found in an express reservation by the society of the right to thereafter amend or change the by-laws in existence when Fiorentina Taglia entered into her contract of membership with the society and in her express agreement to be bound thereby.

Defendant contends that, considering the original article 29, and article 30 of the by-laws together, the recital in article 30, "the society reserves to itself the right to adopt those provisions necessary for the protection and existence of the society," constitutes an express and specific reservation of the right and authority to amend or change the by-law specifying the amount of mortuary benefit payable upon the death of the member. The difficulty of this position is that this language is used only in the section of the by-law having to do with the method and manner of paying the mortuary benefit and the payment by the members of their "tax" or dues. Under no rule of construction with which we are familiar can the effect of this language be strained so as to make it applicable to ^{original} article 29 fixing the amount of the mortuary benefit. In our opinion, the society, recognizing

The power, which is usually vested by-law, is given to the society to amend its constitution, and it is held that such amendments are binding upon the members of the society, even though they may be made after the death of some of the members.

In other words, this society as a matter of expediency, and protection, or even to safeguard the very existence, legally enacted a by-law that would take away the majority benefit of 1800 that it had promised to pay to her family upon her death under a by-law in existence when she insured joined the society and for thirty-five years thereafter, and accordingly therefor a majority benefit at 1800 under the terms of the amended by-law?

It is not claimed that deceased consented to be bound by this amended by-law, and it is conceded, in effect, that such change in the by-law is without binding legal force upon plaintiff unless sanction for it can be found in an express reservation by the society of the right to thereafter amend or change the by-laws in existence when respondent's policy entered into her contract of membership with the society and in her express agreement to be bound thereby.

Defendant contends that, considering the original article 29, and article 30 of the by-laws together, the result in article 30, "The society reserves to itself the right to change those provisions necessary for the protection and advancement of the society," constitutes an express and specific reservation of the right and authority to amend or change the by-law regarding the amount of majority benefit payable upon the death of the member. The difficulty of this position is that this language is used only in the section of the by-law having to do with the method and manner of paying the majority benefit and the payment by the members of their "tax" or dues. Under no rule of construction with which we are familiar can the effect of this language be construed so as to make it applicable outside of fixing the amount of the majority benefit. In our opinion, the society, reserving

that a large number of deaths at one time might imperil its financial stability by requiring too large an outlay of funds, took the precaution to provide in article 30 of its by-laws that the mortuary benefit should be payable in sixty days, but that in the event of the occurrence of a large number of deaths it might adopt provisions necessary for its protection and continued existence. The recital that "the society reserves to itself the right to adopt these provisions necessary for the protection and existence of the society," is part of the same sentence providing for the payment of the mortuary benefit within sixty days and of necessity, by its context and meaning, can only relate thereto. The society could extend the date of payment of its obligation to any date reasonably necessary to accomplish its declared purpose, and we think that this is the only reasonable construction that can be placed on its reservation "for the protection and existence of the society."

It is idle to urge that, in the language of article 30 of the by-laws, there can be found any such reservation of the right to amend or change its by-laws as would authorize the abrogation, attempted by the society, of the vested right of plaintiff, under insured's contract with the society, to a mortuary benefit of \$500 under original article 29 of the by-laws. The rule as to the effect of subsequently enacted by-laws on contracts of insurance theretofore entered into is clearly stated in Covenant Mutual Life Ass'n v. Kentner, 188 Ill. 431, where the court said at pp. 441-442:

"It was stipulated that the by-laws contained a provision that they might be amended, revised or modified, but that is no more than the law would imply without the stipulation. Such power is implied from the general power to enact by-laws. (3 Am. & Eng. Ency. of Law, - 2d ed. - 1964; Fullenwider v. Royal League, 180 Ill. 621.) If a member agrees that future by-laws or amendments shall enter into and form a part of his contract and modify or vary it, he will be bound by such by-laws or amendments because they are a part of his contract. That was the case in Fullenwider v. Royal League, supra. In that case the certificate provided for a payment of certain rates for the widows' and orphans' benefit fund, and the certificate was on the express condition that the member should comply in the future with the laws, rules and regulations that might there-

that a large number of deaths at one time might impair the financial
and possibly by requiring too large an outlay of funds, even the
provision to provide in article 30 of the by-laws that the monetary
benefits should be payable in sixty days, but that in the event of the
occurrence of a large number of deaths it might adopt provisions
necessary for the protection and maintenance of the fund.
that "the society reserves to itself the right to adopt those
provisions necessary for the protection and maintenance of the society,"
in part of the same sentence providing for the payment of the monetary
benefits within sixty days and of course, if the society had provided
can only relate thereto. The society could extend the date of pay-
ment of its obligation to any date reasonably necessary to accomplish
its desired purpose, and we think that this is the only reasonable
connection that can be placed on the reservation "for the protection
and maintenance of the society."

It is also to be noted that, in the language of article 30
of the by-laws, there can be found any such reservation of the right
to amend or change the by-laws as would authorize the amendment,
adopted by the society, of the vested right of plaintiff, under
insurance's contract with the society, to a monetary benefit of \$500
upon the expiration of the term of the by-laws. The rule as to the effect
of amendments made by-laws is contained in numerous decisions
and is almost stated in Ward v. Mutual Life Ins. Co.
120 N.Y. 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

after be enacted by the supreme council to govern said council and fund, all of which were made part of the contract. The insured expressly assented to the conditions, and it was held that the agreement authorized a change in the rate of assessment under a by-law which, in the opinion of the court was not unreasonable. Even if the certificate states that the by-laws are a part of the contract and that they are subject to amendment, subsequent by-laws will be construed to apply only to contracts made after the adoption of such by-laws, in the absence of an agreement that they shall have a retrospective effect. This is upon the principle that all laws and by-laws have a prospective and not a retrospective effect, unless the intent that they shall have a retrospective effect is clear and unmistakable. Unless there is an express agreement that a member shall be bound by future by-laws varying or modifying his contract, he is not so bound. (Black on Benefit Societies, secs. 27, 136, 137.)"

It is urged that the original article 29 of the by-laws fixing the mortuary benefit at \$500 is ultra vires and void in that it is repugnant to and in conflict with the charter powers of the society. This contention is based upon the fact that the charter of the society provides for the creation of its funds by voluntary contribution and the by-law refers to "mortuary tax per capita." There is no merit in this contention and it is effectually disposed of in Jones v. Lealeen Mutual Benefit Ass'n, 337 Ill. 431, where the following language was used by the court at p. 441:

"Appellant in its reply brief calls attention to the fact that the certificate sued on does not provide for the levy of any assessments but only provides for voluntary contributions, and it devotes a considerable portion of its argument to an attempt to distinguish the two words. Conceding that for ordinary purposes the words have different meanings, we think as the word 'contribution' is used in this certificate it had the same meaning as the word 'assessment.' That the so-called contributions were regarded as assessments by the officers of appellant is shown by their testimony on the trial of this cause. In fact, counsel for appellant uses the words interchangeably in the original brief. By whatever name it is called, the fact is that the amount of the contribution or assessment had to be paid by the members to prevent the loss of their rights under their certificates. The failure of any member to pay, when properly notified, would have effected a cancellation of his certificate. The effect would be the same regardless of what word was used. The result of a failure to pay makes it, in fact, an assessment, regardless of the name given it in the certificate."

Amended article 29 of the by-laws might well be effective as to future members of the society, as well as to all those who were members at the time of its enactment ~~xxx~~ who assented to it; but we are constrained to hold that it could not vary or modify plaintiff's rights under the contract of the insured with the society.

For the reasons indicated herein the judgment of the
Municipal court is affirmed.

AFFIRMED.

Friend, P. J., and Seanlan, J., concur.

THE NEW YORK PUBLIC LIBRARY ASTOR LENOX TILDEN FOUNDATION

ASTOR LENOX TILDEN FOUNDATION

1890

THE NEW YORK PUBLIC LIBRARY ASTOR LENOX TILDEN FOUNDATION

37662

VINCENT FORMOSA,
Appellee,

v.

THE PENNSYLVANIA RAILROAD
COMPANY, a corporation,
Appellant.

1057
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

279 I.A. 636³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a fourth class contract action in the Municipal court wherein plaintiff claimed that defendant railroad company breached its agreement to safely carry from New York city, to him, the consignee in Chicago, 30 cases of onions. Upon trial by the court without a jury the issues were resolved in plaintiff's favor and judgment rendered against defendant for \$600. This appeal followed.

The material allegations of plaintiff's statement of claim are that defendant was a common carrier and on or about February 6, 1929, it accepted and received from F. Vitelli & Son at New York city, 30 cases of pipeline onions in good condition for transportation within a reasonable time to plaintiff in Chicago; that in consideration of a certain reward defendant promised to care for, safely carry and deliver such merchandise, and issued a bill of lading for such transportation and delivery; that plaintiff is and has been for a long time the lawful holder of said bill of lading; that defendant was ordered and directed to carry said 30 cases of onions in a specially constructed car known as a refrigerator car and that it promised to do so; that it did not carry such merchandise in a specially constructed or refrigerator car or otherwise care for, safely carry and within a reasonable

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THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 14, 1936

STATE OF NEW YORK
COUNTY OF SOUTHERN DISTRICT

379 I.A. 686

MR. JUSTICE SULLIVAN DELIVERED THE DECISION OF THE COURT.

This is a bench trial held in the Southern District of New York. The plaintiff, a corporation, brought this action against the defendant, an individual, for breach of contract. The contract in question was made on or about January 1, 1935, and provided for the delivery of certain goods to the plaintiff. The defendant failed to deliver the goods as required by the contract, and the plaintiff has sought damages therefor. The court finds that the contract was valid and enforceable, and that the defendant is liable for breach of contract. The court awards damages to the plaintiff in the sum of \$10,000, with interest thereon from the date of breach until payment.

The material allegations of the plaintiff's complaint are true. The defendant was a common carrier and on or about January 1, 1935, it accepted and received from the plaintiff a consignment of goods for transportation. In case of shipping failure in good condition for transportation within a reasonable time to plaintiff in Chicago; that in consideration of a certain sum of money promised to said defendant, namely, \$10,000, the defendant agreed to deliver such merchandise, and issued a bill of lading for such goods. The defendant failed to deliver the goods as required by the bill of lading, and the plaintiff has been damaged. The court finds that the defendant is liable for breach of contract. The court awards damages to the plaintiff in the sum of \$10,000, with interest thereon from the date of breach until payment.

time deliver said onions as agreed, but carried them in a common freight car, and in so careless and negligent a manner that, when they arrived in Chicago and were delivered to plaintiff, they were frozen and otherwise rendered totally unfit for human consumption, and that plaintiff was damaged to the extent of \$602.

Defendant in its affidavit of merits admitted receiving the merchandise at New York city, February 7, 1929, and averred inter alia that when it received this consignment of freight it was enclosed in boxes or crates and not visible; that it did not then know whether or not the merchandise was in good condition and by reason thereof it gave the shipper a receipt and a bill of lading, which recited that it had received the shipment in "apparent good order, contents and condition of contents of packages unknown;" that it "does not admit that said freight was in good condition when received by defendant at New York city, but insists upon strict proof thereof;" that when the freight was delivered to it a written contract of transportation was entered into between it and the consigner or shipper wherein it was provided that the merchandise was to be forwarded in a box car; and denied that it was ordered and directed or that it promised to transport such freight in a specially constructed or refrigerator car. The affidavit of merits admitted that when the merchandise arrived in Chicago it was somewhat damaged by cold weather, but denied that it was destroyed and unfit for human consumption or that its negligence caused any damage to the onions.

Plaintiff's son was the only witness who testified on the trial of the case. He stated that defendant's receipted freight bill contained the notation, "shipment more or less frozen;" that the onions were contained in crates constructed of 4 inch boards nailed 2 inches apart; that, when they were delivered to plaintiff's warehouse, he noticed through the openings of the crates that the onions were in an "abnormal" condition; that he opened all the crates and upon

time before said notice was given, but retained them in a warehouse
Yacht Co., and in no way were they delivered to Plaintiff, they were
they arrived in Chicago and were delivered to Plaintiff, they were
broken and otherwise rendered unfit for human consumption,
and that Plaintiff was damaged to the extent of \$500.

Defendant in the affidavit of service submitted now filing the
complaint at New York City, January 7, 1914, and certain other
affidavits when it received this complaint of Plaintiff it was advised
in boxes on crates and not visible that it did not know where
or what the merchandise was in good condition and by reason thereof it
gave the shipper a receipt and a bill of lading which recited that
it had received the shipment in "excellent good order, contents and
condition of contents of packages unimpaired," that it "does not admit
that said freight was in good condition when received by defendant at
New York City, but admits upon receipt thereof that said
freight was delivered to it in a written contract of transportation and
entered into between it and the consignor on which should be set
provided that the merchandise was to be forwarded in a box only and
that it was covered and insured or that it provided as
transport such freight in a specially constructed or refrigerated car.
The affidavit of service recited that when the merchandise arrived in
Chicago it was damaged because of fire, and that it
was damaged and unfit for human consumption by the negligence
of the carrier, and that it was damaged by the carrier.
Plaintiff's son and the only witness who testified on the
trial of the case. He stated that defendant's receipted bill of lading
recited the contents, "excellent good order, contents and
condition of contents of packages unimpaired," and that it was
delivered in crates consisting of 4 inch boards nailed 2 inches
apart, and that they were delivered to Plaintiff's warehouse, in
which it was the practice of the carrier to deliver the same in
an "open" condition, reciting that in receipt all the goods and upon

inspection found that all the onions were frozen; that he sorted them in an endeavor to salvage as many as possible; that plaintiff sold and delivered ten or fifteen crates of the onions that did not appear "too badly frosted," but that they were all returned as unfit for use; that the shipment resulted in a total loss to plaintiff; and that the fair and reasonable market value of the 3,000 pounds of onions in good condition in Chicago at the time of their delivery was 20 cents a pound or \$600. The bill of lading was not introduced in evidence, and the witness failed to testify as to any agreement to carry the merchandise in a specially constructed or refrigerator car.

It is urged that in an action against a common carrier by railroad for loss or damage to freight in interstate commerce, where the statement of claim shows that a bill of lading was issued by the carrier, the plaintiff must prove the written contract. But plaintiff says that an obligation is imposed by law upon a common carrier of goods to safely carry merchandise delivered to and accepted by it by virtue of the carrier's relation to the shipper, irrespective of the issuance of a bill of lading by the carrier, and that the implied contract arising from such obligation may be enforced without the introduction in evidence of such bill of lading. It has been held that in a tort action based upon the negligence of a common carrier it was unnecessary to either plead or prove a bill of lading, but plaintiff's action is, from the allegations contained in his statement of claim, plainly based upon the alleged promise or undertaking of the defendant to carry the goods in question from a point of shipment in one state to the point of destination in another state. The plaintiff having declared upon the alleged promise of defendant as set forth in his statement of claim, and the defendant having pleaded in effect in its affidavit of merits that it did not promise as averred by plaintiff,

inspection found that all the unions were through that he carried
them in an endeavor to relieve as many as possible; that plaintiff
sold and delivered out of fifteen copies of the subject that the
not appear "free daily through," and that they were all returned on
until the next that the shipment remained in a total loss to plain-
tiff; and that the lost and verminous market value of the \$4,000
pounds of onions is good condition in evidence of the time of their
delivery was 20 cents a pound or \$800. The bill of lading was not
introduced in evidence, and the witness failed to testify as to any
agreement to carry the merchandise in a specially constructed or
refrigerated car.

It is urged that in an action against a common carrier by
plaintiff for loss or damage to freight in interstate commerce, where
the statement of claim shows that a bill of lading was issued by the
carrier, the plaintiff must prove the carrier's contract. Was plaintiff?

very that an obligation is imposed by law upon a common carrier of
goods to safely and securely deliver to and accept of it by
virtue of the carrier's relation to the shipper, irrespective of the
issuance of a bill of lading by the carrier, and that the implied con-
tract arising from such obligation may be enforced without the intro-
duction in evidence of such bill of lading. It has been held that in

a tort action based upon the negligence of a common carrier it was
necessary to either plead or prove a bill of lading, but plaintiff's
evidence is, from the affidavit submitted in his statement of claim,
plaintiff based upon the alleged negligence or negligence of the defendant
to carry the goods in question from a point of shipment in one state
to the point of destination in another state. The plaintiff having
testified upon the alleged negligence of defendant as set forth in his
statement of claim, and the defendant having pleaded in effect in its
affirmative answer that it did not guarantee an event by plaintiff,

the plaintiff had the burden of proving by proper evidence that defendant did promise as alleged in its statement of claim. If there was a bill of lading, and plaintiff alleged that there was and it was in his possession, that necessarily constituted defendant's promise, and proper proof as to whether the defendant did make the promise, as alleged, may only be properly made by introducing the bill of lading or by accounting for its absence, and in that event make necessary proof. (American Fruit Growers v. San Antonio and A. P. R. Co., 239 Ill. App. 151.) The rule is well established that there can be no implied contract where there is an express contract governing the relations of the parties in reference to the same subject matter.

The consignee is bound by the valid terms of the bill of lading issued by the carrier to the shipper, and, since the bill of lading was an express written contract governing the shipment, there is no room nor ground for an implied contract. Where the record shows that a bill of lading has been issued no recovery may be had against the carrier if such bill of lading is not introduced in evidence or its absence accounted for. (Kitza v. Oregon Short Line R. Co., 189 Ill. App. 609; Burtless v. Oregon Short Line R. Co., 180 Ill. App. 249; Finkelstein v. Illinois Central R. Co., 198 Ill. App. 75.)

It is fundamental that before recovery can be had against a common carrier of merchandise in interstate commerce for damage resulting to such merchandise it must be shown that the goods were delivered to the carrier by the shipper at the point of origin in good condition. It is undisputed in this cause that no evidence was offered as to the condition of the onions when they were delivered to the railroad company in New York city. Without such proof plaintiff failed to make out a prima facie case. Plaintiff says, however, that it was unnecessary to make such proof because defendant failed to specifically deny the allegation of his statement of claim that the onions were delivered to it in good conditions. There is no merit

the plaintiff had the burden of proving by proper evidence that defendant had promised or alleged in his statement of claim. It is not a bill of lading, but plaintiff alleged that there was and is was in his possession, that necessarily constituted defendant's promise, and proper proof as to whether the statement in the bill of lading or by admitting the bill of lading, but in that event, when necessary proof. (See Chicago & North Western v. Chicago & North Western, 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

in plaintiff's contention.

The defendant disclaimed knowledge of the condition of the onions at the time they were delivered to it by the shipper. It averred that it gave a receipt upon their delivery to it that they were "in apparent good order, contents and condition of contents unknown" and demanded strict proof of their condition at that time. We are impelled to conclude that this averment required plaintiff to prove that the onions were in good condition when they were delivered to defendant by the shipper. It was not incumbent upon defendant to open the crates and inspect their condition. If such a burden were placed upon a railroad it would make it practically impossible for it to handle its business, and harm and inconvenience to the shipper would likely result therefrom. (Marshaw, Fuller & Goodwin Company v. Illinois Central R. Co., 252 Ill. App. 253.)

Plaintiff alleged that there was a written contract of transportation and that he was in possession of the bill of lading for the shipment. That was the contract of carriage and it was incumbent upon him to prove it, as well as that the onions were in good condition when delivered to defendant.

For the reasons indicated herein the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Friend, P. J., and Seanlan, J., concur.

in plaintiff's possession.

The defendant claimed knowledge of the condition of

the engine at the time they were delivered to it by the shipper.

It averred that it gave a receipt upon their delivery so it that

they were "in apparent good order, condition and condition of con-

dition unknown" and demanded strict proof of their condition at that

time. It was insisted by defendant that this receipt was given

plaintiff to prove that the engine was in good condition when they

were delivered to defendant by the shipper. It was not necessary

upon defendant to open the engine and inspect their condition. It

took a further step when a witness is called who is specifically

impossible for it to handle the business, and from the inspection

in the engine would likely receive a receipt. (Exhibit, Exhibit 2)

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37691

GERTRUDE FISHER,
Appellee,

v.

THOMAS H. McCLURE,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

279 I.A. 636⁴

MR. JUSTICE HULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$4,800 in favor of plaintiff, Gertrude Fisher, and against defendant, Thomas H. McClure, entered March 24, 1934, upon the verdict of a jury in an action for personal injuries received by plaintiff as the result of an accident which occurred January 26, 1933, at the intersection of Sheridan road and Glengyle place, Chicago.

Plaintiff's declaration consists of five counts. The first charges general negligence, and alleges that while plaintiff, in the exercise of due care for her own safety, was walking west across Sheridan road at Glengyle place she was struck by defendant's automobile, which was proceeding north on Sheridan road and being operated in a careless and negligent manner. The second count charges negligence in violation of the statute in reference to speed. The third count charges negligence by reason of the failure of the operator of the automobile to sound his horn or otherwise give adequate warning of its approach. The fourth count charges negligence in failing to keep a proper lookout for plaintiff. The fifth count, charging willful and wanton conduct on defendant's part, was withdrawn by plaintiff at the close of all the evidence.

Defendant filed a plea of the general issue and a special plea denying ownership, operation and control of the automobile involved in the accident.

The evidence is undisputed that plaintiff, returning home

THOMAS H. BARNETT,
Plaintiff,
vs.
JAMES H. BARNETT,
Defendant.

STATE OF TEXAS,

COUNTY OF DALLAS,

SS: J. A. GREGG,

Notary Public in and for the State of Texas,

do hereby certify that the foregoing is a true and correct copy of the

deed of partition, bearing date the 14th day of

January, 1914, between James H. Barnett, Plaintiff,

and Thomas H. Barnett, Defendant, as the same appears from the

record of said county, to-wit: Book 14, Page 100.

Witness my hand and the seal of said county, this 14th day of

January, 1914.

Notary Public in and for the State of Texas.

My commission expires the 14th day of January, 1915.

Attest: J. A. GREGG,

Notary Public in and for the State of Texas.

My commission expires the 14th day of January, 1915.

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Notary Public in and for the State of Texas.

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Notary Public in and for the State of Texas.

My commission expires the 14th day of January, 1915.

from her place of employment at the Fair Store, alighted from a northbound motor bus on Sheridan road at the northeast corner of that street and Glengyle place at 6:30 p.m.; that Glengyle place does not run through Sheridan road to the west; that plaintiff lived at 5050 Sheridan road, which was on the west side of the street and a short distance north of Glengyle place; that there were no stop and go lights at Glengyle place, but there were at Argyle street, a block to the south, and at Foster avenue, a block to the north; that, before proceeding across Sheridan road on the north crosswalk of Glengyle place, plaintiff looked to the north and south and saw no automobile traffic except a car about a block south at Argyle street coming north; that, after she had taken two or three steps from the east curb of Sheridan road, she looked south again and saw the car "about a half block * * * closer to Argyle than it was to Glengyle;" that she then walked west across Sheridan road and was struck by the automobile. Plaintiff testified that she did not remember being struck, and that she regained consciousness the next day in the hospital.

Howard B. Swank testified in plaintiff's behalf that he was standing on the porch of his home at 5042 Sheridan road, which is on the west side of the street about 100 feet north of Glengyle place; that he saw plaintiff walking west across Sheridan road on the north crosswalk of Glengyle place, and that she had almost reached the center of the drive when she was struck by an automobile which was going about 35 miles an hour; that "from where I was standing it looked to me like the center of the machine, front center" struck her; that she was dragged or pushed along 50, 75 or 100 feet on the left front part of the car and then the car stopped; that he was prevented from crossing the street immediately because of automobiles going south; that the car that struck plaintiff backed up, drove around plaintiff's body, drew up to the east curb and stopped; that when he turned around, after assisting plaintiff into the car of a passing motorist, the car that struck her was gone; that it was a

from her place of employment at the White House, advised from a
northwestern motor bus on Madison road at the northwest corner of
that street and Chicago place at 6:30 p.m.; that Chicago place
does not run through Madison road to the west; that plaintiff lived
at 2000 Madison road, which was on the west side of the street and a
short distance north of Chicago place; that there were no steps and
no lights at Chicago place, but there were at Chicago place, a block
to the north, and at Foster avenue, a block to the north; that, before
proceeding across Madison road on the north crosswalk of Chicago
place, plaintiff looked to the north and south and saw no automobile
within twenty feet of the crosswalk; that plaintiff saw a light-colored
Ford, after she had taken two or three steps from the east curb of
Madison road, she looked south again and saw the car "about a half
block" - a closer to Chicago place than it was to Chicago place; that she then
crossed west across Madison road and was struck by the automobile.
Plaintiff testified that she did not remember being struck, and that
she remained unconscious the next day in the hospital.
Howard B. Frank testified in plaintiff's behalf that he was
standing on the porch of his home at 2000 Madison road, which is on
the west side of the street about 150 feet north of Chicago place;
that he saw plaintiff walking west across Madison road on the north
crosswalk of Chicago place, and that she had almost reached the
corner of the street when she was struck by an automobile which was
going about 35 miles an hour; that "from where I was standing it
looked to me like the center of the machine, front center" struck
her; that the car struck her on the head and she fell; that he saw
her fall from the top of the car and that the car stopped; that he saw
her motionless from crossing the street immediately because of automobile
going south; that the car that struck plaintiff backed up, drove
about plaintiff's body, drove up to the east curb and stopped; that
she lay on the ground, after crossing plaintiff into the car of a
passing motorist, the car that struck her was gone; that it was a

Plymouth car and the last three numbers of its license plate were 411; that the street lights were on and the headlights of the car were burning, but no horn was sounded; that he went home and in about twenty-five or thirty minutes an officer arrived with defendant and inquired if anybody there had witnessed the accident, and he told the officer that he had; that he went with them out to the curb in front of his home where a car was standing, and the officer asked him if he could identify it as the car that struck plaintiff; that he did identify it by the last three numbers of the license plate, 411, its top and general appearance; that he inspected the front of the car and found the grill work or radiator guard in the front of the car dented in; and that he asked defendant if he knew he had hit anybody and defendant said that he thought he had hit a rock in the road or something at that particular point.

Evans E. Plummer also testified in plaintiff's behalf that he and one Powell pulled up to the east curb of Sheridan road, north of Glengyle place, opposite street number 5050, in the Plymouth car of a friend, James Milner, and that after he and Powell had alighted therefrom they stood on the east curb behind Milner's car ready to cross to the west side of the street at that point; that he looked south and 60 or 80 feet from where he stood he saw "what appeared to be something in front of the car, and falling;" that "we were both excited - we thought something had happened;" that the car drove on; that both he and Powell wrote down the license number of the car that drove away and checked it with each other; that he and Powell ran over to find out what happened and saw an unconscious woman in the street midway between the center of Sheridan road and the east curb; that they commandeered an automobile and with the assistance of others placed plaintiff in it and took her to the Edgewater Hospital; that in the meantime some man jumped on the step of Milner's car, still parked at the east curb, and said "get that car;" and that sometime later his

...and the fact that the number of the license plate was
...that the street light was on and the headlights of the car
...were burning, but no horn was sounded; that he went down and in
...about twenty-five or thirty minutes an officer arrived with defendant
...and explained to anybody there had witnessed the accident, and he told
...the officer that he had; that he went with them out to the car in
...front of his home where a car was standing, and the officer asked him
...if he could identify it as the car that struck plaintiff; that he did
...identify it by the fact that the number of the license plate, 111, 122
...top and general appearance; that he inspected the front of the car
...and found the grill work or radiator guard in the front of the car
...bent in; and that he asked defendant if he knew he had his anybody
...and defendant said that he thought he had his a week in the rear of
...identified as that particular plate.
...James H. Kilmer also testified as plaintiff's witness that
...he and the family lived up to the fact that at defendant's house
...of 111-122's license, opposite street number 8088, in the Lincoln car
...of a friend, James Kilmer, and that after he and Towell had stopped
...thereafter they stood on the east curb behind Kilmer's car ready to
...cross to the west side of the street at that point; that he looked
...across and 80 or 82 feet from where he stood he saw "that appeared to
...be coming in front of the car, and saying," "oh" he went down
...quickly - he thought something had happened; that he saw some one
...that both he and Towell were then the license number of the car that
...crossed away and checked it with each other; that he and Towell ran
...very fast and what happened and saw an automobile woman in the
...street riding between the center of Lincoln road and the curb and
...that they were stopped on a sidewalk and with the assistance of others
...placed plaintiff in it and took her to the Jefferson Hospital; that in
...the morning some man jumped on the top of Kilmer's car, still parked
...at the east curb, and said "get that car," and that morning later his

friend Milner, who chased the car, the license number of which he and Powell had taken, arrived at the hospital, as did defendant and the police officer who had stopped him at Devon avenue and Sheridan road and brought him back; that defendant's Plymouth car carried license plates bearing the same number that he and Powell wrote down at the scene of the accident. He also testified: "The front grill of the radiator was smashed in as if by some soft and not a metallic object. The grill was mashed in between three or four inches of the center, and very badly mashed in on the right bumper. The car carried a license plate. The license plate had been swung back on its mounting, and one of the bolts holding the license plate to the bracket had scratched fresh paint off of the - there was a fresh scratch off of the right front fender."

Plummer testified further that defendant admitted that the car which the officer brought him back in was his car and that he passed Glengyle place traveling north on Sheridan road about the time of the accident; that, when defendant was asked if he did not know that he had struck a woman, he stated: "I felt a bump as if I had hit a stone or something, but I did not realize that I had hit anyone;" and that he and Powell made police reports of the accident, and that Powell was employed in Cincinnati and Milner in New York city at the time of the trial.

Three police officers testified that the grill in front of the radiator on defendant's Plymouth coach was dented, more or less, after the accident. One of the officers also stated that defendant said that he did not know that he had struck plaintiff "but he had felt a thud like he run over a rock and hit his machine."

Defendant, Dr. McClure, in his testimony disclaimed all knowledge of the accident. He stated that his 1933 automobile license plate number was 19-411; that he did not run into a person at about the 5000 block on Sheridan road that night; and that he did

...the car, the license number of which is
and Oswald was taken, arrived at the hospital, as his statement
and the police officer who had stopped him at Seven Avenue and
Western Road and brought him back; that defendant's physician and
examined license plates bearing the same number that he and Oswald
wrote down at the scene of the accident. He also testified "The
front grill of the machine was smashed in as if by some soft and
not a metallic object. The grill was marked in between three or
four inches at the center, and very deeply marked on the right
corner. The car carried a license plate, the license plate had
been swung back on the mechanism, and one of the bolts holding the
license plate to the bracket had corroded through part of the
bracket and a piece swung off at the right hand corner."
...the car which the officer brought him back in was his car and that
he passed through the police station on the same day.
the time of the accident; that, when defendant was taken to the
not know that he had struck a woman, he stated: "I felt a bump as
if I had hit a stone or something, but I did not realize that I had
hit anyone;" and that he and Oswald made police reports at the
accident, and that Oswald was registered in defendant's name in
New York city at the time of the trial.
These police witnesses testified that the grill is found
at the hospital on defendant's physician's report, more or
less, after the accident. One of the witnesses also stated that
defendant said that he did not know that he had struck anyone,
but he had felt a bump as if he had hit a stone or something."
...defendant, Dr. McGuire, in his testimony distinguished all
knowledge of the accident. He stated that his 1933 automobile
license plate number was 12-411; that he did not know into a person
as there the back on Western Road that night; and that he did

not remember his car striking plaintiff about 6:30 p.m. that evening. He further stated that he had no recollection of telling the police officer or anybody else that he felt a thud as if he had struck a rock or some other object at about that point in the road, and that he could not say definitely if he felt a bump of any sort when passing Glengyle place on Sheridan road. He admitted that the Plymouth coach he was driving when the officer stopped him was his, and that he had driven north on Sheridan road past Glengyle place a short time prior to being stopped. He stated further that the officer who stopped him was riding on the running board of a Plymouth coach just like his own (Milner's car), and that the point where he was stopped was about a mile and a half from the scene of the accident.

Whether plaintiff was in the exercise of reasonable care for her own safety, whether defendant was guilty of negligence as charged in the declaration, and whether defendant owned and operated the automobile involved in the accident were all questions of fact properly submitted to the jury under the evidence shown by the record in this case. There was ample evidence to warrant the jury in fairly resolving all three questions in plaintiff's favor.

It is contended that the court erred in allowing plaintiff's expert witness to testify, as it is claimed, to subjective symptoms. It is true it has repeatedly been held that the testimony of a physician is incompetent which is given after examination of a patient solely for the purpose of testifying and is based wholly on the physician's observation of outward manifestations within the control of the person examined. (Grainke v. Chicago City Ry. Co., 234 Ill. 564.) Plaintiff's counsel do not question the rule, but contend that the symptoms testified to by the physician were not subjective and that his knowledge of plaintiff's condition was not based on voluntary actions on her part. (Mathaway v. Shannon, 265 Ill. App. 600.)

not remember his not visiting Plaintiff about 1935 or 1936 evening.
He further stated that he had no recollection of calling the Police
officer to report this case as it was a case of a man and a woman
and that he was not present at the time.
He stated that the Plaintiff was not present at the time
he was driven when the officer stopped him and that he had
never seen the Plaintiff since that time.
He stated that the officer who stopped
him was riding on the rear of a Lincoln coach just like his
own (Plaintiff's own), and that the officer who was stopped was about
a mile and a half from the scene of the accident.
The officer who was in the vicinity of the accident was
for her own safety, whether defendant was guilty of negligence or
charged in the declaration, and whether defendant owned and operated
the automobile involved in the accident were all questions of fact
properly submitted to the jury under the evidence shown by the record
in this case. There are ample reasons to warrant the jury in fairly
submitting all these questions to Plaintiff's jury.
It is contended that the court erred in allowing Plaintiff's
expert witness to testify, as it is claimed, to subjective symptoms.
It is true it has repeatedly been held that the testimony of a
physician is incompetent which is given after examination of a patient
solely for the purpose of diagnosing and is based wholly on the
physician's observation of outward manifestations within the patient.
In the present case, (Citation V. Plaintiff, 1935, 100 Cal. 2d 111)
Plaintiff's counsel do not challenge the fact, but contend
that the symptoms testified to by the physician were not subjective
and that his knowledge of Plaintiff's condition was not based on
outwardly visible or testable facts. (Citation V. Plaintiff, 1935, 100 Cal. 2d 111)

Dr. Wm. J. Swift testified that the conditions and symptoms that he found as a result of the tests he made were objective. He states that he rubbed his finger over plaintiff's eyeballs with her eyelids open and that there was "no flickering or anything else * * * not a bit of complaint;" that he held her tongue with one tongue compressor while he wiggled another around her throat and found her "sensation was markedly reduced for an average individual;" that he used a reinforced Rosberg test to examine her stability by having her, with her eyes open, bring up her fingertips and touch her nose, first with one hand and then the other, lowering them in turn; that he then said to her, without advising her as to the purpose of the test, "now close your eyes and go through the same movements," and that as she did so she swayed; that when he tested her patella reflexes by striking the ligament on each of her legs just below the kneecap, "her feet flew up very actively, far beyond normal." No statements or complaints of plaintiff to Dr. Swift were allowed to be given in evidence.

We are not prepared to say that the symptoms and conditions found and testified to by Dr. Swift are not considered objective by the medical profession, and there is no refutation in the record of their being such, defendant's expert witness, Dr. Pease, not even being asked his opinion as to whether they were or not. In Mathaway v. Shannon, supra, where plaintiff's expert witness in that case testified that spinal rigidity and restriction of motion were objective, and it was objected that they were subjective, the court said:

"No evidence was offered by the defendant to refute these statements of the physician regarding the rising of the muscles. Under such a state of facts, we are of the opinion the court did not err in overruling the motion to strike the evidence of this witness. (Schmidt v. Chicago City Ry. Co., 239 Ill. 494.)"

In Krakowski v. Aurora, Elgin and Chicago Railroad, 167 Ill. App. 469, the court said at page 473:

"It is the law that subjective symptoms or tests, obtained from a plaintiff during an examination by a physician for the purpose of testifying upon the trial, are inadmissible. Shaughnessy v. Holt,

Dr. Williams testified that the condition and symptoms
that he found as a result of the tests he made were objective. He
stated that he rubbed his fingers over Plaintiff's forehead and
eyelids open and that there was no fluctuation or swelling, also
not a bit of complaint. That he held her tongue with one finger
compressor while he signed another around her throat and found her
respiration was markedly relaxed for an average individual. Also he
used a retort stand hanging back to examine her steadily by having her
with her eyes open, during her fingering and touch her nose, find
with one hand and with the other, directed back is such that the
said to her, without giving her as to the purpose of the test, "now
close your eyes and go through the same movements," and that as she
did so she wept; that when he stated her forehead reflexes by striking
the ligament on each of her legs just below the knee, "her legs
threw up very actively, her breast moved." He also stated that
of Plaintiff to Dr. Williams were allowed to be given in evidence.
He was not prepared to say that the symptoms and conditions
found and testified to by Plaintiff are not admitted objectives by
the medical profession, and there is no reflection in the record of
their being used. Plaintiff's expert witness, Dr. Brown, was
being asked his opinion as to whether they were or not. In Hawthorne
v. Brown, 1902, 100 F. 2d 1001, the expert witness in that case
testified that spinal rigidity and restriction of motion were objective,
and it was objected that they were subjective. The court said:
"No witness was offered by the defendant to refute these
statements of the physician regarding the state of the muscles."
There was a split of two of the opinion the court did not
set in overruling the motion in relation to the evidence of this witness.
Hawthorne v. Brown, 100 F. 2d 1001, 1002."
In Plaintiff v. Brown, 1902, 100 F. 2d 1001, 1002.
It is the law that subjective symptoms are not, of course
admitted as evidence in a medical case by a physician and the purpose
of testimony upon the trial, are inadmissible. Hawthorne v. Brown

236 Ill. 488; Grainke v. Chic. C. Ry. Co., 234 Ill. 564. Inasmuch, however, as one or more of the physicians in this case testified that the tremulousness of the hands and of the tongue and eyelids of the appellee were involuntary and not within his control and could not be simulated, the evidence thereof objected to by appellant was competent. The fact that other physicians testified that they were under the control of the voluntary muscles and could be simulated, did not render the evidence inadmissible for that reason; but in such case it was properly left to the jury as a fact for them to determine whether or not such symptoms were involuntary or simulated."

A hypothetical question, which assumed to contain a complete history of the case, was propounded to the doctor, and he was asked if he had an opinion based upon reasonable medical and surgical certainty as to what the symptoms enumerated in the question indicated. He answered that his opinion was "this woman sustained a concussion of the brain * * * injury to the brain." Then followed another hypothetical question put rather inaptly and in a fragmentary fashion, but which the doctor finally answered by stating that it was his opinion, based upon reasonable medical certainty, that the conditions which he found upon his examination of plaintiff might or could have resulted from the concussion of the brain which he deduced from the symptoms enumerated in the previous hypothetical question. The doctor stated his opinion to be that the conditions which he found upon his examination of plaintiff December 26, 1933, "may last as long as the patient lives, and they may clear up." Thereafter he said it was his opinion, "that in view of the fact this woman was injured in January and these objective findings were present in December, and in view of the fact of the various complaints stated in the hypothetical question, I believe the condition is permanent."

It is claimed that the hypothetical questions propounded to the doctor did not cover the complete history of the case and that his answers must, therefore, have been based upon a self serving history given to him by plaintiff on the occasion of his examination of her. A careful inspection of all the evidence contained in the record convinces us that the hypothetical questions were fairly

comprehensive of the facts. At any rate defendant cannot now be heard to complain that all the facts in evidence were not included in the hypothetical questions when no specific objection was made to the questions when they were asked, and it was not pointed out to the trial court what portions of the questions were deemed improper or what facts comprising the history of the case were omitted. We think this to be the established rule and it is obviously its purpose to permit such questions to be reframed if objections made to them are sound. Moreover, on cross-examination, defendant's counsel had the privilege, which they did not exercise, of incorporating in any such questions any facts in evidence which they felt were omitted or of omitting such portions of them as they deemed should not have been included. (City of Alade v. Honeyman, 206 Ill. 415; Chicago City Ry. Co. v. Bundy, 210 id. 39; Riverton Coal Co. v. Shepherd, 207 id. 395.)

In any event no point is made in defendant's brief and argument that the amount of the verdict is excessive. It is not denied that plaintiff received considerable injury, and even if the physician who examined her for the purpose of testifying did base his opinion partly upon subjective symptoms we do not see that defendant was harmed thereby. (Browder v. Northwestern Gas L. & C. Co., 182 Ill. App. 26.)

Instruction No. 3 given on the court's own motion is complained of chiefly because in enumerating elements to be considered in determining upon which side is the preponderance of the evidence, the instruction told the jury what elements it "will" take into consideration instead of what elements it "may" or "might" take into consideration. There is no merit in this contention. There are some cases where language is used which would suggest that an instruction which tells the jury what evidence it "will" or "should" take into consideration is erroneous. The jury does not have any

option to consider any evidence it may think proper. It is its duty to consider the evidence admitted by the court. (Bosch v. Chicago Ry. Co., 221 Ill. App. 241; Walters v. Checker Taxi Co., 265 Ill. App. 329; Meyer v. Mead, 83 Ill. 19.) In the latter case an instruction told the jury what it "must" take into consideration, and we think it is a better and more correct word than that it "may" or "might" take such evidence into consideration. We are unable to see how a jury could have been misled by the use of the word "will" instead of the word "may" or "might" in the instruction. No proper elements were omitted and the jury was left free to consider all the evidence in the case. The weight to be given to the elements enumerated and all the evidence was left solely to the jury. We think defendant was not prejudiced by the use of the word "will." (Bosch v. Chicago Ry. Co.; Walters v. Checker Taxi Co.) (Supra.)

Defendant complains also of instruction No. 1 given at plaintiff's instance, which states, "the jury have a right to and they should take into consideration all of the evidence pertaining to plaintiff's physical injuries ***, and then goes on to enumerate proper elements of damage to be considered by it. Objection is made (1) to the use of the word "should," (2) that the instruction refers to the declaration, and (3) that the jury might be misled into allowing damages not properly recoverable. It is sufficient to state that as to the use of the word "should" in this instruction we think its use fitting and expressive of the meaning the court sought to convey to the jury. As to the reference in the instruction to the declaration, it is only necessary to say that defendant also referred to the declaration in instruction No. 5 given at his request, and, under such circumstances, he cannot be heard to complain. (Lerrette v. Davis, 225 Ill. App. 93; Tennemacher v. Choate, 224 Id. 42.)

We fail to see how the jury in this case could possibly have been

We fail to see how the jury in this case could possibly have been

mised by being told that it should consider "all the evidence pertaining to plaintiff's physical injuries." Thereafter, in the same instructions, the physical injuries for which plaintiff might recover were limited to those shown by the evidence to have been "the proximate result of the accident." Defendant asserts that the jury, under this instruction, may have allowed damages, particularly for the curvatures of plaintiff's spine and her diseased ear. The first must be excluded, inasmuch as the record discloses that plaintiff's counsel told the jury in his closing argument that "we are not making any claim for back injuries," and the second because plaintiff testified that she suffered from a discharge of her ear before the accident. We think defendant was not prejudiced by the giving of this instruction.

Defendant objects to the refusal by the court to give instructions Nos. 1, 5 & 6 and 7 requested by him. Counsel cite cases which hold that it was erroneous to refuse similar instructions. We have carefully examined every case cited and find none that is applicable to the situation presented here where the rules of law set forth in the refused instructions are fully covered by the instructions given. Our examination and consideration of all the instructions lead to the conclusion that the jury was fully and fairly instructed and that there was no substantial error in the refusal of those rejected. (Chicago City Ry. Co. v. Bundy, supra.) Taking the instructions as a whole and as constituting a single charge, which must be done, they state the rules of law applicable to the facts of the case with substantial accuracy and are sufficient to fully inform the jury as to the rights of the respective parties. (West Chicago City R. R. Co. v. Lieserowitz, 197 Ill. 607; Central Ry. Co. v. Hannister, 195 Ill. 48.)

Finding no reversible error the judgment of the Circuit court is affirmed.

AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

37748

ANNA MacDONALD,
Appellee,

v.

ROY H. MacDONALD,
Defendant.

Appeal of A. G. DICUS,
Appellant.

107 H
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

279 I.A. 637¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

November 8, 1933, appellant as solicitor for Anna MacDonald filed a bill for divorce in her behalf against her husband, Roy H. MacDonald, which contained an allegation that certain income-producing real estate belonged to the parties in joint tenancy.

January 15, 1934, it was ordered by the court that Anna MacDonald collect all rents from the property and turn them over to the mortgage holder to be applied on account of principal, interest and taxes.

It was ordered February 5, 1934, that Anna MacDonald, the wife, receive out of the rents \$7 a week and that she or "her solicitor receive the rents and the balance be deposited in a bank subject to the further order of the court."

Thereafter, June 8, 1934, upon the suggestion of the death of defendant, Roy H. MacDonald, on motion of defendant's solicitor, it was ordered that A. G. Dicus, attorney for complainant, turn over within five days to the clerk of the Superior court, until judicial disposition thereof, "all funds and sums of money now in

STATE

IN SENATE,
JANUARY 10, 1906.

V.

JOHN W. MCDONALD,
Respondent.

Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

COURT, JOHN W. MCDONALD.

287 A. 1. 87

THE COURT, after reading the petition of the respondent,

November 8, 1905, and the answer thereto, and the

petition of the respondent, filed on the 10th day of January, 1906,

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and the petition of the respondent, filed on the 10th day of January, 1906,

his custody and possession by reason of a certain order heretofore entered in said cause and that this cause be dismissed by reason of defendant's decease." The appellant seeks to reverse this last order.

Appellant contends that the court erred in entering the order because no allegations had been made in any petition or otherwise that he had any such funds, because no proof was made that he had or has any such funds, because no finding was made that he had any such funds, because he was not called upon to meet any allegations by answer or proof, because the order is not definite as to the amount that he should turn over, and, is, therefore, incapable of being complied with.

A prior order authorized appellant or his client to receive certain rents and deposit them in a bank subject to the further order of the court. It does not appear from the record whether appellant ever received such rents, but if he did no accounting was ever made of them to the court. The court does not find in the order that appellant has in his custody and possession any money received as rent, but its purport is that if he has he should turn it over to the clerk for disposition by the court. If he has or had any of such rent money in his custody or possession when the order was entered it was not his in so far as the record discloses, and we can perceive no reason for any complaint on his part because of the entry of the order, nor are we able to perceive any excuse or justification for his refusal or reluctance to comply with it. If he did not have custody or possession of rent money theretofore received by him under the prior order of the court, it would have been a very simple matter for him to so advise the court of which he was an officer.

We are unable to understand how appellant could have been harmed in anywise by the entry of the order even though it may have been improvidently entered, and we are not holding that it was. In our opinion it is not an appealable order.

This appeal should be and it is dismissed.

Friend, P. J., and Seanlan, J., concur.

APPEAL DISMISSED.

his custody and possession by reason of a certain order entered in said court and that this order be dismissed by reason of defendant's demand. The applicant seeks to reverse this last order.

Applicant contends that the court erred in entering the order because no allegations had been made in any petition or otherwise that he had any such funds, because no proof was made that he had or has any such funds, because no finding was made that he had any such funds, because he was not called upon to meet any allegations by answer or proof, because the order is not definite as to the amount that he should pay, and, lastly, because of being

neglected with. A prior order authorized applicant to file affidavits to receive certain funds and deposits then in a bank subject to the further order of the court. It does not appear from the record whether applicant ever received such funds, but it is his understanding that he has never received them. The court does not find in the order that applicant has in his custody and possession any money received or sent, but the purpose is that if he has he should turn it over to the court for disposition by the court. It is not to be taken for granted that money in his custody or possession when the order was entered is not his in so far as the record discloses, and we can perceive no reason for any complaint on his part because of the entry of the order, nor can we claim to perceive any error or justification for his refusal or reluctance to comply with it. It is his duty to comply or possession of such money that is not received by him under the prior order of the court, it would have been a very simple matter for him to so advise the court at which he was an officer.

We are unable to understand how applicant could have been harmed or prejudiced by the entry of the order even though it was not immediately entered, and we are not holding that it was. In our opinion it is not an appealable order. This appeal should be and is dismissed.

37784

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,

vs.

JOHN GREEN,

Defendant in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

279 I.A. 637²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On December 19, 1933, an information was filed in the Municipal court of Chicago charging defendant with driving away his automobile after a person had been injured by being struck by the automobile, contrary to the statute. Afterward defendant entered a plea of not guilty, waived a jury; the court heard the evidence, found defendant guilty and sentenced him to sixty days in the House of Correction and a fine of \$200 was imposed. Defendant was taken to the House of Correction and afterward a notice was served on the State's Attorney and a petition filed. The petition prayed that the judgment be set aside and vacated in accordance with the provisions of section 89 of the old Practice act, and considerable facts are stated tending to bring defendant within the provisions of that section. Afterward defendant was brought before the Municipal court and an order entered sustaining his motion for a new trial. He then entered a plea of not guilty, waived a jury, and there was a hearing. The court found defendant not guilty, and he was discharged.

The sufficiency of the petition was not raised in the matter pointed out in People v. Green, 358 Ill. 468, and People v. Parsons, 358 Ill. 448. The evidence taken on the hearing is not in the record before us.

For the reasons stated in an opinion filed this day in the case of People of the State of Illinois v. Henry Gardner, No. 37781, the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

37857

GRANT C. OSBORNE,

vs.

ROBERT J. KROSCHER et al.

WILLIAM B. ROBINSON, Jr.,
Appellee.

A. G. DICUS and F. W. FRASER,
Appellants.

1897
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 637³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

The record discloses that a bill was filed to foreclose a first mortgage on real estate in which the owner of a second mortgage, and others, were made parties defendant. The owner of the second mortgage filed no pleading and was defaulted, and a decree of foreclosure entered. The property was sold as provided for in the decree. There was a deficiency decree and a receiver appointed who collected rents with which he paid the deficiency and had \$556.62 remaining in his hands. After the period of redemption had expired F. W. Fraser obtained a quit-claim deed from the mortgagor. William B. Robinson, Jr., was the owner of the premises at the time the foreclosure suit was brought, but he was not the maker of the mortgage which was being foreclosed. Fraser, Robinson and A. J. Dicus (the owner of the second mortgage) each claimed the \$556.62 in the hands of the receiver. There was a hearing and the money was awarded to Robinson, who was the owner of the equity of redemption, and Dicus and Fraser appeal.

Both joined in filing one brief in this court and say: "The Court erred in not decreeing the fund to Fraser who was the owner of the equity of redemption by a genuine conveyance of the fee and not as a mortgage. Robinson's conveyance was only given as a mortgage."

"The fund rightfully belongs to A. G. Dicus appellant because

1917

GRANT O. CHAMBERLAIN

VS.

ROBERT J. KROENKE et al.

WILLIAM B. ROBINSON, Jr.,
Appellee.

A. G. DICKS and E. W. FRASER,
Appellants.

THIRD JUDICIAL DISTRICT

OF COOK COUNTY.

2891A 037

WILLIAM B. ROBINSON, JR.,
DEVELOPER OF THE PROPERTY

The record discloses that a bill was filed to foreclose a first mortgage on real estate in which the owner of a second mortgage, and others, were made parties defendants. The owner of the second mortgage filed no pleading and was defaulted, and a decree of foreclosure entered. The property was sold as provided for in the decree. There was a deficiency decree and a receiver appointed who collected rents with which he paid the deficiency and had \$253.62 remaining in his hands. After the period of redemption had expired T. W. Fraser obtained a quit-claim deed from the mortgagee, William B. Robinson, Jr., was the owner of the premises at the time the foreclosure suit was brought, but he was not the maker of the mortgage which was being foreclosed, Fraser, Robinson and A. G. Dicks (the owner of the second mortgage) each obtained the \$253.62 in the hands of the receiver. There was a loan of the money was made to Robinson, who was the owner of the equity of redemption, and Dicks and Fraser agreed to join in filing one brief in this court and say: "The court finds in not decreeing the loan to Fraser who was the owner of the equity of redemption by a genuine conveyance of the fee and not as a mortgage. Robinson's conveyance was only made to Dicks and Fraser."

he held a second mortgage on which there was still due \$1500. Dicus claims that the mere fact that he did not file an answer does not bar him from claiming after the first lien was paid in full, the balance or excess to apply upon and reduce his lien. Appellants however are agreed that the fund may be decreed to either or both appellants."

It is a general rule of law that after the sale of premises on foreclosure where there is no deficiency, the owner of the equity of redemption is entitled to the rents until the time of redemption expires. And where there is a deficiency which has been paid, the owner of the equity of redemption is thereafter entitled to the rents during such period. Davis v. Dale, 150 Ill. 239.

In the instant case the period of redemption having expired before Fraser obtained his quit-claim deed from the mortgagors, he has no interest in the rents collected during the period of redemption. Defendant, Dicus, the owner of a second mortgage on the premises foreclosed, although served with process, filed no pleading but was defaulted. If he would have the amount due him protected, he must file his answer or cross bill and make proof of the amount due him so as to have it included in the foreclosure decree. Not having done so, his rights are cut off by the foreclosure and he can make no claim to the rents collected by the receiver during the period of redemption. Neither Fraser nor Dicus has any claim to the moneys involved in this appeal; so that we might end the case without saying anything further, but we are of opinion that the Chancellor properly awarded the money to defendant, Robinson, who was the owner of the equity of redemption, having taken title to the property for the Wilmette State Bank, the owner of the indebtedness.

The record discloses that the mortgagors, the Kroschels, were indebted to the bank in three mortgages, one for \$6900 and one

he held a second mortgage on which there was still the sum of \$1000.
He also claims that the note that he did not file an answer
does not bar him from claiming after the first lien was paid in
full, the balance or excess to apply upon and reduce his lien.
Appellants however are agreed that the fund may be decreed to
either or both appellants.
It is a general rule of law that after the sale of premises
as for example when there is no redemption, the owner of the equity
of redemption is entitled to the rents until the time of redemption
expires. And where there is a deficiency which has been paid, the
owner of the equity of redemption is thereafter entitled to the rents
until such period. David v. State, 100 Ill. 239.
In the instant case the period of redemption having expired
before Turner obtained his first claim from the mortgagee, he
has no interest in the rents collected during the period of redemp-
tion. Defendant, Bland, the owner of a second mortgage on the prop-
erty, although never the owner, still as a lien-
or was satisfied. If he would have the amount due him protected,
he must file his answer or cross bill and make good of the amount
due him so as to have it included in the foreclosure decree. Not
having done so, his rights are cut off by the foreclosure and he can
make no claim for the rents collected by the mortgagee during the
period of redemption. Neither Turner nor Bland has any claim for the
rents involved in this appeal; so that we might and the case without
paying anything further, but we are of opinion that the Chancellor
erroneously awarded the money to defendant, Robinson, who was the owner
of the equity of redemption, having taken title to the property by
the Windsor State Bank, the owner of the first mortgage.
The record discloses that the mortgagee, the Windsor State Bank,
were indebted to the bank in three mortgages, one for \$5000 and one

for \$10,000, and had executed their mortgages on properties securing these two amounts. The other mortgage here in foreclosure was for \$12,000. March 15, 1932, the \$6900 indebtedness was cancelled and the \$10,000 indebtedness on another piece of property which was held as collateral by the bank, was returned to the Kroschels in consideration of the conveyance by the Kroschels of the property in question to Robinson. This put the title to the property in Robinson for the bank, and Robinson being the title owner at the time of the foreclosure and during the period of redemption, was entitled to the rents collected during that period by the receiver, less the amount required to pay the deficiency decree.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Hatchett, JJ., concur.

for \$10,000, and had executed their mortgages on properties amounting to \$10,000. The other mortgage was in favor of the bank for \$10,000. March 18, 1932, the \$10,000 mortgage was cancelled and the \$10,000 indebtedness on another piece of property was cancelled. The bank, was returned to the bank, was returned to the bank in consideration of the convenience of the bank of the property in question is returned. This was the title of the property in question for the bank, and Robinson being the title owner of the bank of the bank and during the period of redemption, was entitled to the bank collected being that being in the bank, and the amount required to pay the deficiency being the interest of the bank of bank amount is returned.

DEMONSTRATION.

Robinson and Robinson, 11, corner.

37873

JOHN F. STEIL and FRIEDA STEIL,
Appellees,

vs.

THE COUNTY OF COOK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

37874

DESPLAINES STATE BANK, a Cor-
poration, as Trustee,
Appellee,

vs.

THE COUNTY OF COOK,
Appellant.

279 I.A. 637⁴

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

37875

DESPLAINES STATE BANK, a Cor-
poration, as Trustee,
Appellee,

vs.

THE COUNTY OF COOK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

The foregoing three cases have been consolidated for hearing with case No. 37944, Chicago Title and Trust Co., a Corporation, as Trustee, v. The County of Cook, in which latter case we have today filed an opinion; and for the reasons stated in that opinion the judgment of the Superior court, in each case, is reversed and the cause remanded for further proceedings as therein stated.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Matchett, JJ., concur.

STATE

JOHN F. STEEL AND OTHERS DEFENDANTS

VS.

THE COUNTY OF YORK, Appellants.

STATE

THE COUNTY OF YORK, Appellants, vs. JOHN F. STEEL AND OTHERS, Defendants.

VS.

THE COUNTY OF YORK, Appellants.

STATE

THE COUNTY OF YORK, Appellants, vs. JOHN F. STEEL AND OTHERS, Defendants.

VS.

THE COUNTY OF YORK, Appellants.

MR. PRESIDENT, JUSTICE O'CONNOR
RECEIVED THE OPINION OF THE COURT.

The foregoing three cases have been consolidated for

argument with case No. 2711, THE COUNTY OF YORK, Appellants, vs. JOHN F. STEEL AND OTHERS, Defendants.

THE COUNTY OF YORK, Appellants, vs. JOHN F. STEEL AND OTHERS, Defendants. is also being argued and have today filed an opinion; and for the reasons stated in that opinion the judgment of the superior court, in each case, is reversed and the cases remanded for further proceedings as herein stated.

Respectfully and obediently, J. J. ...

37883

G. R. HIGH,

vs.

R. G. LYDY, INC., a Corporation,
and R. L. HUGHES,
Appellants.

FINANCE CREDIT CORPORATION,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 6381

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants, R. G. Lydy, Inc., a corporation, and R. L. Hughes, seek to reverse a judgment of the Municipal court of Chicago for \$175, entered against them on a finding of the court in favor of the Finance Credit Corporation, which intervened in the cause.

October 20, 1932, G. R. High, by his attorney, John Martin, brought an action against R. G. Lydy, Inc., a corporation, and R. L. Hughes, to recover damages claimed to have been sustained by him through the negligence of the defendants in damaging plaintiff's automobile. The damages were laid in the sum of \$1000.

October 23, 1932, the defendants, by their attorney, William A. Hanson, filed an affidavit of merits denying liability. May 8, 1933, an order was entered by stipulation of the parties (signed by Martin and Kaufman, whereby I. W. Kaufman's appearance was entered as an additional attorney for plaintiff) which provided that no disposition should be made of the case without the consent and approval of Kaufman. May 3, 1934, defendants filed an amended affidavit of merits in which they again denied liability and averred that plaintiff should not further maintain his action because he had executed a release whereby he released and forever discharged defendants from all claims. Four days later, May 7th, the Finance Credit Corporation, by its attorney, Kaufman, filed its intervening petition in which it set up that it was engaged

W. G. LYNN, INC., a Corporation,
and A. L. ROBERTS,
Appellants.

THOMAS CREDIT CORPORATION,
Appellee.

THE THOMAS CREDIT CORPORATION
v.
W. G. LYNN, INC., and A. L. ROBERTS.

By this appeal the defendants, W. G. Lynn, Inc., a corporation, and A. L. Roberts, seek to reverse a judgment of the United States Court of Appeals for the Fifth Circuit, entered against them on a writ of habeas corpus in favor of the Thomas Credit Corporation, which intervenor is the appellee.

October 20, 1933, W. G. Lynn, by his attorney, James Martin, brought an action against W. G. Lynn, Inc., a corporation, and A. L. Roberts, to recover damages claimed to have been sustained by him through the negligence of the defendants in handling his five automobiles. The damages were laid in the sum of \$1000.

October 25, 1933, the defendants, by their attorney, William A. Rogers, filed an affidavit of merits denying liability. May 2, 1934, an order was entered by the United States Court of Appeals for the Fifth Circuit, which provided

that no disposition should be made of the case without the consent and approval of the court. May 3, 1934, defendants filed an amended affidavit of merits in which they again denied liability and

averred that plaintiff should not further maintain his action because he had executed a release whereby he released and forever discharged defendants from all claims. Four days later, May 7, 1934, the Thomas Credit Corporation, by its attorney, James Martin, filed its supplemental petition in which it set up that it was engaged

in the automobile banking business; that April 6, 1932, it loaned money to High, who executed a chattel mortgage on the automobile which was damaged by defendants and was the basis of the suit, and that there was a balance due from High on account of the money loaned to him. It was further averred that about July 1, 1932, the automobile in question was wrecked while on the parking premises belonging to defendant Lydy; that afterward High defaulted in the payments due as provided in the chattel mortgage; that after default the Finance company learned of the damage to the automobile and the pendency of the suit in the Municipal court, and May 3, 1933, it entered into an agreement with High whereby he conveyed to it "one-half interest in his claim and cause of action," and that High and the petitioner entered into the stipulation above mentioned.

The petition further set up that on May 8, 1933, the cause came on for hearing in the Municipal court; that Kaufman, counsel for the petitioner, appeared before the court and advised the court of petitioner's interest in the suit and of the agreement entered into between High and the petitioner, as above stated; that at that time all the parties were represented before the court, and the prayer was that leave be given the petitioner to intervene. An order was entered accordingly. May 9th the cause was heard before the court without a jury and there was a finding in favor of the intervenor, Finance Credit Corporation, for \$175 against the defendants; judgment was entered on the finding, and the defendants appeal.

The record discloses that plaintiff, High, entered into a written agreement with the Finance Credit Corporation, the intervenor, which recited that he was indebted to it in the sum of \$438.20 by virtue of a promissory note and chattel mortgage on the automobile in question. The agreement further recites the pendency

In the automobile accident involving; that night, 1935, it is stated
 money to High, who executed a chattel mortgage on the automobile
 which was damaged by defendant and was the basis of the suit, and
 that there was a balance due from High on account of the money
 loaned to him. It was further stated that about July 1, 1935,
 the automobile in question was wrecked while in the parking
 premises belonging to defendant; that defendant had notified
 in the payments due as provided in the chattel mortgage; and after
 default the Finance Company learned of the damage to the automobile
 file and the payment of the suit in the Municipal Court, and on
 3, 1935, it entered into an agreement with High whereby he conveyed
 to it "one-half interest in his claim and cause of action," and
 that High and the petitioner entered into the stipulation above
 mentioned.
 The petition further set up that on May 8, 1935, the cause
 came on for hearing in the Municipal Court; that defendant, counsel
 for the petitioner, appeared before the court and advised the court
 of petitioner's interest in the suit and of the agreement entered
 into between High and the petitioner, as above stated; that at that
 time all the parties were represented before the court, and the
 prayer was that leave be given the petitioner to intervene. An
 order was entered accordingly. May 27th the cause was heard before
 the court without a jury and there was a finding in favor of the
 intervenor, Finance Credit Corporation, for \$150 against the de-
 fendant; judgment was entered in the finding, and the defendant
 appeal.
 The record discloses that plaintiff, High, entered into a
 written agreement with the Finance Credit Corporation, the inter-
 venor, which recited that he was indebted to it in the sum of
 \$150.00 by virtue of a promissory note and chattel mortgage on the
 automobile in question. The agreement further recited its purpose

of the case in the Municipal court; that plaintiff's claim in that case was for the recovery of the value of the automobile, and that High had assigned "one-half interest in his claim and cause of action" to the intervenor.

The evidence further shows that plaintiff, High, on June 6, 1933, in consideration of \$350 paid to him by Lydy and Hughes, executed a general release releasing defendants from all claims "from the beginning of the world to the date hereof" and particularly all claims and damages to the automobile in question which plaintiff had parked in one of defendants' parking lots. The release referred particularly to the Municipal court case.

The Finance Credit Corporation, the intervenor, contends that judgment for \$175 in its favor is right and should be affirmed for the reason that before defendants obtained the release from plaintiff, in consideration of \$350, they were advised of plaintiff's assignment to it of one-half of plaintiff's interest in the suit.

There is no evidence that defendants assented to the assignment and obviously plaintiff and defendants had a right to settle their differences if they chose to do so, without noticing the assignment to the intervenor. Eaves v. C. B. & Q. R. R. Co., 200 Ill. App. 380. By the assignment the intervenor did not obtain any lien on the claim made by plaintiff in the suit such as is provided by the Attorney's Lien Act (par. 13, chap. 13, Cahill's 1933 Statutes.)

Moreover, there was no evidence offered on the trial to prove that plaintiff had a cause of action against the defendants. He had alleged facts setting up a legal claim on the ground of defendants' negligence, but defendants had denied all negligence. The fact that defendants had paid plaintiff \$350 for a release does not necessarily prove that if the case were tried plaintiff would

of the case in the Municipal court; that plaintiff's claim in that case was for the recovery of the value of the automobile, and that High had assigned "one-half interest in his claim and cause of action" to the intervenor.

The evidence further shows that plaintiff, High, on June 8, 1933, in consideration of \$350 paid to him by Lydy and Hughes, executed a general release releasing defendants from all claims "from the beginning of the world to the date hereof" and further fully all claims and damages to the automobile in question which plaintiff had paid in one of defendants' previous tests. The release referred plaintiff to the Municipal court case.

The Kansas Credit Corporation, the intervenor, contends that judgment for High in its favor is right and should be affirmed for the reason that before defendants obtained the release from plaintiff, in consideration of \$350, they were advised of plaintiff's assignment to it of one-half of plaintiff's interest in the suit.

There is no evidence that defendants assented to the assignment and obviously plaintiff and defendants had a right to settle their differences if they chose to do so, without releasing the intervenor to the intervenor. Bay v. Bay, 100 Kan. 111, 169 P. 230. By the assignment the intervenor did not obtain any lien on the claim made by plaintiff in the suit even as it was assigned by the plaintiff's last test. Id., 100 Kan. 111, 169 P. 230 (statutes).

Moreover, there was no evidence offered on the trial to prove that plaintiff had a cause of action against the defendants. He had alleged facts setting up a legal claim on the ground of defendants' negligence, but defendants had denied all negligence. The fact that defendants had paid plaintiff \$350 for a release does not necessarily prove that if the case were tried plaintiff would

have been successful. Cameron v. Illinois Steel Co., 162 Ill. App. 461.

For the reasons stated the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely and Matchett, JJ., concur.

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4. 2. 1990

for the purpose of the following:

...and the ...

37891

JOHN H. STEINBERGER,
Appellee,

vs.

MARION S. FINK,
Appellant.

113
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 638²

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment of \$500 entered after trial by the court. Plaintiff's claim was for damages through the breach of an alleged contract between the parties. Defendant asserts that there was no contract between them - that their minds never met.

Plaintiff owned lot 16, block 3, in North Oak Park Subdivision; he entered into negotiations with defendant looking to the erection by plaintiff of a residence on the lot and a conveyance to defendant of the entire premises; the negotiations to this end ran along for some time; in December, 1930, plaintiff submitted to defendant a rough sketch of an elevation of the residence; again in February, 1931, plans of the residence were submitted, which were not acceptable to defendant and further plans were submitted; February 26, 1931, defendant wrote his "O.K." on blue prints of the proposed residence; these blue prints were merely of the plans of the proposed residence, showing dimensions.

Plaintiff subsequently submitted to defendant a draft of a contract dated March 10, 1931; this was not acceptable to defendant; May 11th a further contract was prepared by plaintiff's lawyer and submitted to defendant; specifications drawn by plaintiff's architect were also submitted to defendant, who said he would have his lawyer examine the contract and his architect examine the specifications; thereupon defendant's lawyer re-drew the contract and his architect revised the specifications, making specific the character

Page 1

JOHN M. STIMMONS,
Attorney.

WILLIAM E. WALKER,
Attorney.

MR. JUSTICE ROBERTSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment of \$500 entered after trial by the court. Plaintiff's claim was for damages for breach of an alleged contract between the parties. Defendant asserts that there was no contract between them - that each acted alone.

Plaintiff owned lot 10, block 8, in North Oak Park subdivision. He entered into negotiations with defendant looking to the erection by plaintiff of a residence on the lot and a conveyance to defendant of the entire premises; the negotiations so far and the progress of same time; in December, 1930, plaintiff submitted to defendant a rough sketch of an elevation of the residence; again in January, 1931, plans of the residence were submitted, which were not accepted by defendant and further plans were submitted; February 10, 1931, defendant wrote his "L.L." to the owner of the property; these facts being in evidence at the trial of the parties' evidence, showing otherwise.

Plaintiff subsequently submitted to defendant a draft of a contract dated March 10, 1931; this was not acceptable to defendant; and later a further contract was prepared by plaintiff's lawyer and submitted to defendant; specifications drawn by plaintiff's architect were also submitted to defendant, who said he would have his lawyer examine the contract and his architect examine the specifications; defendant's lawyer re-drew the contract and the architect revised the specifications, making possible the erection

279 L.A. 688

of plumbing fixtures and other details which had been omitted from the specifications tendered by plaintiff. The contract prepared by defendant's attorney called for a price of \$21,500 for the lot, house and garage. Plaintiff refused to sign this contract, giving as his reason that it had an objectionable clause. Plaintiff testified that he 'phoned defendant about this objectionable clause and was told by defendant to strike it out and go ahead with the work. Defendant denies this and testified that plaintiff said he would not sign the contract tendered by defendant because the specifications revised by defendant's architect would require an added charge of about \$1000 or \$1500 over the price of \$21,500 stated in the contract.

Plaintiff testified that when ^{he} got ready to start building defendant stopped him; that some cement forms for concrete work were brought to the lot but were not used and no work was done. Later, by letter dated May 18, 1931, defendant notified plaintiff that further negotiations were terminated.

It is clear that both parties intended that a written contract should be executed by them. Plaintiff refused to sign the contract tendered by defendant for perhaps a justifiable reason, namely, that it called for an increased cost of construction. The parties never did agree in whole, and no contract was signed. Plaintiff's claim is based upon the alleged breach of a contract and ensuing damages in his lost profits. If the parties could not agree on the cost and the character of the construction, there was no contract between them. Currie v. Syndicate Des Cultivators Des Cigognes a'Eleur, 104 Ill. App. 165; Russo v. Ginocchio, 288 Ill. 470; Stone v. Daggett, 73 Ill. 367.

Plaintiff says that there are many cases holding that where parties have verbally agreed on terms and the builder is directed to proceed with the work called for by the plans, ^a written contract is not necessary to bind the parties. Defendant denied that he gave any such instructions, and we are inclined to think that the greater

of plumbing fixtures and other details which had been omitted from the specifications tendered by plaintiff. The defendant, however, by defendant's attorney called for a price of \$21,500 for the lot, garage and garage. Plaintiff refused to sign this contract, giving as his reason that it was an objectionable clause. Plaintiff testified that he 'phoned defendant about this objectionable clause and was told by defendant to strike it out and to meet with the jury. Defendant also said this and testified that plaintiff said he would not sign the contract tendered by defendant because the specifications revised by defendant's architect would require an added charge of about \$1,000 or \$1500 over the price of \$21,500 stated in the contract. Plaintiff testified that when ^{he} got ready to sign building defendant stopped him; that some amount for the contract was proposed to the lot but was not good and he with some other, later, by letter dated May 15, 1934, defendant notified plaintiff that further negotiations were terminated.

It is clear that both parties intended that a written contract should be executed by them. Plaintiff refused to sign the contract tendered by defendant for garage and parking space, and that it called for an increased cost of construction. The parties never did agree in writing, and no contract was signed. Plaintiff's claim is based upon the alleged breach of a contract not existing between him and his last partner. If the parties could not agree on the cost and the execution of the construction, there was no contract.

Between them, James T. ... and ...

James T. ... and ...
James T. ... and ...

Plaintiff says that there are many cases holding that where parties have verbally agreed on terms and the matter is directed to proceed with the work called for by the plans, written contract is not necessary to bind the parties. Defendant denied that he gave any such instructions, and we are inclined to think that the question

weight of the evidence supports his statement.

Even if defendant's position should be somewhat weakened by the question of fact involved with reference to the alleged directions to go ahead with the work, there is another and conclusive reason why plaintiff is not entitled to recover.

The contract proposed was for the conveyance by plaintiff to defendant of real estate with buildings. In contemplation of the law such buildings are real estate. Defendant pleaded the statute of frauds, which provides that no action shall be brought to charge any person upon any contract for the sale of lands unless such contract or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith. Chap. 59, sec. 2, Illinois Statutes (Cahill.) This rule has been applied in many cases. Danaherry v. Holloway, 342 Ill. 334; Kohlbrecher v. Guettermann, 329 Ill. 246. In the instant case neither party signed any contract or any memorandum, and plaintiff did no work which might have had the effect of avoiding the operation of the statute.

First Presbyterian Church v. Swanson, 100 Ill. App. 39, cited by plaintiff, is not in point. There was merely an agreement to erect a building. No conveyance of land was involved. This is also true of Wendnagel v. Schiavone, 203 Ill. App. 335. In Ullsberger v. Meyer, 217 Ill. 262, the vendor received part of the purchase price of the real estate and gave a receipt which recited the total price and was signed by the vendor. It was held that this was a sufficient memorandum as it contained the names of the parties, description of the real estate and the terms and conditions of the sale.

Plaintiff argues strenuously that the G. E. placed by the defendant upon the plans is a sufficient memorandum in writing. These sketches contain merely plans and show nothing about cost,

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TO ASSIST IN THE RECOVERY OF THE REMAINING BALANCE OF THE DEBT OF THE UNITED STATES TO THE UNITED STATES OF AMERICA

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Written, dated by the party as indicated in serial

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State of Alabama, this 2nd day of March 1900, before me, the undersigned, a Notary Public in and for said State, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, acknowledged to me that he executed the same for the purposes and consideration therein expressed.

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character of material or workmanship, interior trim, lighting or plumbing fixtures. Moreover, defendant noted his O. K. on the plans in February, 1931, while no estimates as to cost were submitted until the following month. As we have seen, the parties failed to agree as to the cost of the residence constructed as defendant desired. Blue prints of plans was not a sufficient memorandum in writing to charge defendant upon a contract to purchase real estate. It follows that the statute of frauds is a complete bar to any recovery in this case.

For the reasons indicated the judgment is reversed, and as plaintiff cannot recover judgment will be entered for defendant in this court.

REVERSED AND JUDGMENT FOR
DEFENDANT HERE.

O'Connor, B. J., and Matchett, J., concur.

[illegible]

37908

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,
Complainant,

vs.

WILLIAM WALSH et al.,
Defendants.

WALTER A. HAGEN, as Successor-
Receiver of HOTEL LAWRENCE,
Appellee,

vs.

WILLIAM L. O'CONNELL, as Successor-
Receiver of PHILLIP STATE BANK AND
TRUST COMPANY,
Appellant.

279 I.A. 638³

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MCGUINLEY DELIVERED THE OPINION OF THE COURT.

This case involves \$300 allowed to William L. O'Connell, successor-receiver of Phillip State Bank and Trust Company as fees for services, and the question presented is, Out of which of two funds should this allowance be paid? The facts are not in dispute.

In Chicago Title and Trust Company, Trustee, v. Walsh et al., the instant case, a foreclosure proceeding in the Circuit court, the Phillip State Bank and Trust Company was appointed receiver of the Hotel Lawrence; thereafter, on June 20, 1932, the bank filed its first report and account as such receiver, and the court allowed it \$150 to apply on account as its fees as receiver.

June 21, 1932, the bank was closed by the Auditor of Public Accounts, and thereafter William L. O'Connell was appointed successor-receiver of the bank in the case of People ex rel. Hagen, etc. v. Phillip State Bank & Trust Company, in the Superior court of Cook county.

June 25, 1932, Walter A. Hagen was appointed, in the Circuit court case, receiver of the Hotel Lawrence as successor to the bank,

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

..to 1000 1000

WALTER A. RABIN, as undersigned,
Receiver of NORTH LAWRENCE,
NORTH CAROLINA.

RECEIVED AT THE
STATE DEPARTMENT
WASHINGTON, D. C.
JAN 10 1954

U. S. DEPARTMENT OF JUSTICE

[illegible]

which was unable further to act as receiver.

When the bank was closed by the Auditor it had in its trust department a credit of the Hotel Lawrence receivership amounting to \$699.77; this is one of the two funds involved in this appeal.

February 19, 1934, O'Connell filed in the Circuit court case the final report and account of the bank, as receiver of the Hotel Lawrence, and on that date an order was entered approving the final report and allowing O'Connell the further sum of \$150 as payment in full of all services of the bank as receiver in the Circuit court foreclosure suit. This made a total of \$300 allowed as receiver fees in the foreclosure proceeding.

O'Connell had in his possession certain scrip and tax warrants of the Hotel Lawrence receivership, and on February 19th the Circuit court ordered him to sell them at the highest market price obtainable, and after payment of fees and any minor expenses necessarily incident to the closing of the estate (the Hotel Lawrence receivership) he was to pay all remaining moneys and property in this receivership to Walter A. Hagen, successor-receiver of the Hotel Lawrence, taking his receipt therefor, and thereupon the bank, as receiver in the Circuit court proceedings, and O'Connell, would be discharged and relieved of all further responsibility in that case. Pursuant to this order of the court the scrip and tax warrants were sold for \$925; this is the other fund involved in this appeal; O'Connell deducted therefrom the amount of \$300, which had been allowed as fees, and remitted the balance, \$625, to Walter A. Hagen, successor-receiver of the hotel.

Thereafter, on May 13, 1934, Hagen, as successor-receiver of the hotel, filed his petition in the Circuit court in the instant case, contending that the fees of \$300 allowed the bank should be credited against the \$699.77 of the Hotel Lawrence account in the trust department of the bank when it was closed, and that the amount

which was unable further to act as receiver.

When the bank was closed by the liquidator it was the first
document a credit of the hotel furniture was made to the bank
§ 333.77; this is one of the two funds involved in this case.

February 19, 1904, O'Connell filed in the Circuit Court
some the final report and account of the bank, as received of the
final account, and on that date he was appointed receiver
the final report and allowing O'Connell the better sum of \$125 as
payment in full of all services of the bank as receiver in the
Circuit Court proceedings. This was a copy of the final
as receiver there is no further proceeding.

O'Connell had in his possession certain notes and bank
notes of the hotel furniture receivership, and on February 19th the
Circuit Court ordered him to sell them at the highest market price
possible, and after payment of fees and any other charges there-
on to deposit the balance of the proceeds in the bank (the hotel furniture
receivership) as was to pay all remaining debts and property in
this receivership as far as it was possible to do so.
The Court, having the final report and account of the bank,
as received in the Circuit Court proceedings, and O'Connell's
discharge and release of all former responsibility in that case.
Pursuant to this order of the court the notes and bank warrants were
sold for \$225; this is the other fund involved in this case;
O'Connell deducted therefrom the amount of \$250, which had been al-
lowed to him, and retained the balance, \$225, to Walter A. Brown,
administrator of the hotel.

Thereafter, on May 12, 1904, O'Connell, as administrator of
the hotel, filed his petition in the Circuit Court in New York
City, asking that the fund of \$225 should be paid to him
and that he be appointed receiver of the hotel furniture receivership in the
Circuit Court of the City of New York, and that he be appointed
receiver of the hotel furniture receivership in the Circuit Court of the City of New York.

of these fees should not be deducted from \$925, the proceeds of the sale of the scrip and tax warrants, and the Circuit court was requested to order O'Connell, as receiver of the bank, to return the \$300 forthwith to the petitioner.

After hearing the Circuit court on August 22nd, ordered that the sum of \$300 allowed for services to the bank should be set off against the sum of \$699.77 owing by the bank to the Hotel Lawrence account, and that the bank should credit itself and deduct the said \$300 from this account, reducing the balance to \$399.77. The court also found that the deduction of the \$300 for receiver's fees out of the proceeds of the sale of the tax anticipation warrants was unlawful, and O'Connell, as successor-receiver of the bank, was ordered to refund and pay to the petitioner (Hagen) the sum of \$300. O'Connell, as successor-receiver of the bank, appeals from this order.

We are of the opinion that the order was improperly entered. The amount of \$699.77 in the bank to the credit of the Hotel Lawrence receivership was in the possession of the receiver of the bank, appointed by the Superior court. It was part of the properties coming into the hands of the Superior court receiver and could be paid out by him only upon an order of the Superior court pursuant to a petition filed in that court by Hagen, the successor-receiver of the hotel.

Moreover, the scrip and tax warrants came into the possession of the Circuit court receiver of the Hotel Lawrence just as all the property of the hotel came into possession of its receiver, and was properly subject to the payment of the fees of the receivership.

The point involved has been already passed upon by this court in Chicago Title and Trust Co. v. Goldman, 273 Ill. App. 457. There the receiver of the bank (the same as in the instant

of which there would not be collected from 1935, the proceeds of the sale of the ship and the warrants, and the client would have requested an order of O'Connell, as receiver of the bank, to return the \$200 loaned to the petitioner.

After making the client aware of the bank's position, that the sum of \$200 allowed for services to the bank would be set off against the sum of \$200.77 owing by the bank to the bank's account, and that the bank would retain the sum of \$200.77, the court also found that the possession of the \$200.77 receiver's fees out of the proceeds of the sale of the bank and the other property was unlawful, and O'Connell, as receiver of the bank, was ordered to return and pay to the petitioner (bank) the sum of \$200.77. O'Connell, as receiver of the bank, was ordered to return the bank's account.

We are of the opinion that the order was properly entered. The amount of \$200.77 is the bank's credit to the hotel. The receiver's fees are in the possession of the receiver of the bank, appointed by the Superior court. It was part of the receiver's fees, into the hands of the Superior court receiver and could be paid out by him only upon an order of the Superior court receiver and to a creditor listed in the court by date, the receiver of the hotel.

However, the ship and the warrants were in the possession of the client court receiver of the hotel loaned to the receiver, the property of the hotel came into possession of the receiver, and was properly subject to the payment of the fees of the receiver.

The point involved has been already passed upon by this court in Chicago Title and Trust Co. v. Walker, 273 Ill. App. 3d, 197, where the receiver of the bank (the bank) is in the hands

case) appointed by the Superior court was ordered by the Circuit court to pay a successor-receiver in a foreclosure proceeding in the Circuit court a certain amount of money which the bank had to the credit of the foreclosure receivership. After considering many decided cases it was there held that where a court takes the assets of an insolvent corporation in its hands for distribution it is for that court, alone, to determine who its creditors are and the amount of their respective claims. It was also said that the proper procedure was for the chancellor of the Circuit court to order the successor-receiver in the foreclosure case to file a claim in the bank receivership proceedings in the Superior court, and "in that proceeding in an orderly, equitable way, all of the creditors of the bank will have their day in court." If, as petitioner claims in the instant case, the fund of \$699.77 was not mingled with the other funds in the bank, this fact can be ascertained and determined in the proceedings in the Superior court.

The Goldman opinion also noted that many of the closed banks in Cook county show very similar conditions to those presented in that case, which was considered to be "a test case." We are of the opinion that opinion prescribes the proper procedure in such cases.

For the reasons indicated the order of August 22, 1934, appealed from is reversed and the cause is remanded with directions to vacate the same.

REVERSED AND REMANDED.
WITH DIRECTIONS.

O'Connor, P. J., and Hatchett, J., concur.

37987

HARRY CROSS,
Appellee,

vs.

MISSOURI INSURANCE COMPANY,
a Corporation,
Appellant.

157
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

279 I.A. 638⁴

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of \$1000 entered after trial by the court of an action upon an accident insurance policy issued to Lee Cross, in which plaintiff was named as beneficiary.

The declaration alleged that the insured came to his death as the result of burns. Defendant admitted a liability of \$100 but denied any further liability, asserting that by a provision in the policy no indemnity would be paid for accidental death "sustained at a time when the insured is delirious or under the influence of any narcotic or intoxicant *** or for alcoholism in any form."

Defendant introduced evidence tending to support its claim that the insured was intoxicated at the time of the accident. Plaintiff introduced evidence tending to show the contrary.

The insured was injured on the morning of February 24, 1929; he lived alone in a basement; a city fireman was summoned to the premises and going into the basement found the insured lying on his side on the floor; a hot stove had tipped over and was partially on top of him; the fire was extinguished. The insured was alive when the fireman found him but was badly burned. He was taken to Cook County hospital where, as a result of the burns, he died the morning of March 1.

A Dr. Bennett, who was an intern at the Cook County hospital, testified he first saw the insured at the hospital about two or three hours after the patient was brought there, which would be about six

279 L.A. 688

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of \$1000

entered after trial by the court of an action upon an accident

insurance policy issued to Leo Gross, in which plaintiff was

named as beneficiary.

The declaration alleged that the insured came to his death

as the result of burns. Defendant admitted a liability of \$1000

but denied any further liability, asserting that by a provision in

the policy no indemnity would be paid for accidental death "arising

at a time when the insured is delirious or under the influence of

any narcotic or intoxicant *** or for alcoholism in any form."

Defendant introduced evidence tending to support its claim

that the insured was intoxicated at the time of the accident. Plaintiff

introduced evidence tending to show the contrary.

The insured was injured on the morning of February 22, 1930;

he lived alone in a basement; a city fireman was summoned to the

premises and going into the basement found the insured lying on

his side on the floor; a hot stove had tipped over and was partially

on top of him; the fire was extinguished. The insured was alive

when the fireman found him but was badly burned. He was taken to

Cook County Hospital where, as a result of the burns, he died the

morning of March 1.

A Dr. Bennett, who was an intern at the Cook County Hospital,

testified he first saw the insured at the hospital about two or three

days after the accident and testified that the insured was in a

or seven hours after the accident. Dr. Bennett testified he could not remember this particular patient, and after examining the hospital records he was under the impression the patient there described was under the influence of alcohol when he came in; that "we probably smelled liquor on him." The hospital record notes that the patient was unable to give any account of what happened; that he was "semi-stuporous, apparently alcoholic. Admits having been drinking." The police record notes that the patient "cannot talk." The nurse's record shows that the patient received doses of paraldehyde, which Dr. Bennett said was commonly given in hospitals in the case of alcoholics, although it does not necessarily follow that every patient for whom this medicine is prescribed has been drinking.

The city fireman testified that when he turned over the body of the insured in the basement he did not smell any odors indicating intoxication; that he saw no liquor bottles or anything of that nature.

A barber testified that he gave the insured a haircut and shave in his shop at about one o'clock in the morning of February 24th; he said that when a person got into the barber chair he would notice whether or not he had been drinking because the barber's face is always close to that of the other person; that when you stand over a person and shave him you know whether or not he has been drinking. This witness testified that the insured was in good condition and free from any odor of liquor; that when he left the shop at about one o'clock he was normal.

A brother of the insured testified that he saw the insured on the evening of February 23rd at about eleven o'clock in the tailor shop where the insured worked as a presser; he testified that he was in good health at the time and that he was not disposed to drinking intoxicating liquor; that he was at that time sober and

or seven hours after the accident. Dr. Bennett testified he could not remember this particular patient, and after examining the hospital records he was under the impression the patient there described was under the influence of alcohol when he came in; that "we probably smelled liquor on him." The hospital record notes that the patient was unable to give any account of what happened; that he was "semi-conscious, apparently alcoholic. Admits having been drinking." The police record notes that the patient "cannot talk." The nurse's record shows that the patient received doses of paraldehyde, which Dr. Bennett said was commonly given in hospital in the case of alcoholics, although it does not necessarily follow that every patient for whom this medicine is prescribed has been drinking.

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A barber testified that he gave the insured a haircut and shave in his shop at about one o'clock in the morning of February 24th; he said that when a person got into the barber chair he would notice whether or not he had been drinking because the barber's face is always close to that of the other person; that when you stand over a person and shave him you know whether or not he has been drinking. This witness testified that the insured was in good condition and free from any odor of liquor; that when he left the shop at about one o'clock he was normal.

A brother of the insured testified that he saw the insured on the evening of February 23rd at about eleven o'clock in the salar shop where the insured worked as a presser; he testified that he was in good health at the time and that he was not disposed to drinking intoxicating liquor; that he was at that time sober and

had been drinking nothing.

From this evidence the trial court was of the opinion that the defendant had failed to prove that the insured was under the influence of alcohol at the time of the accident. We cannot say that this conclusion is against the manifest weight of the evidence.

Plaintiff in his brief asks this court to enter a judgment for \$1000, plus interest. We shall not do this for the reason that upon the trial the counsel for plaintiff expressly stated that interest was not claimed, and furthermore, the ad damnum is \$1000. We would not be justified in entering a judgment in any larger amount.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

and from driving outside.
From this evidence the trial court was of the opinion that
the defendant had failed to prove that the deceased was not the
father of the child at the time of the accident. The court
therefore concluded that the defendant was not entitled to a
verdict in his favor and this court to enter a judgment
for \$1000, plus interest. We would not do this for the reason that
even the trial court seemed to doubt whether the child was
father was not claimed, and furthermore, the defendant is
not to be justified in entering a judgment in any other
manner.

For the reasons indicated the judgment is affirmed.
AFFIRMED.

O'Connell, J., and Murphy, J., dissent.

33002

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

GEORGE BRADOVITCH,
Plaintiff in Error.

116 17
ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

279 I.A. 638⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with stealing three suits of men's clothing and upon trial by the court was found guilty and sentenced to the House of Correction for three months and fined \$1.00. He seeks a reversal.

His first point is that the statute requires that every person arrested upon information or complaint for a criminal offense shall be furnished with a copy of the information or complaint upon which he is charged not less than one hour before his arraignment, hearing or examination. Chap. 38, par. 753 (1), Illinois Statutes (Cahill) 1933. Defendant says that no copy of the information was furnished him.

The record does not support this claim. The only thing touching the point is an affidavit made by defendant, which was filed with the clerk nearly two weeks after the trial. In this defendant undertakes to say that no copy of the information was furnished to him or to his attorney at any time before or after the trial. Apparently this affidavit was filed with the clerk without leave and the attention of the court was not called to it at any time. Neither was the court asked to pass upon it, and there is no ruling of the court with reference to it. There is, therefore, nothing in this respect to be reviewed by us. Moreover, the record shows that by agreement of the parties the case was submitted to the court for trial without a jury. We must assume that defendant was properly informed of the charge against him.

Apparently through clerical inadvertence the jurat to the

PAGE

PROSECUTION OF THE STATE OF ILLINOIS
Defendant in Error

RETURN TO THE JUDICIAL CLERK

279 I.A. 688

Defendant in Error

RE. JUDICIAL COUNCIL REPORT ON THE CASE

Defendant was charged with stealing three units of money
eighting and upon trial by the court was found guilty and sentenced
to the House of Correction for three months and fined \$1.00. He
was a patrol.

His first point is that the statute requires that every
person arrested upon information or complaint for a criminal
offense shall be furnished with a copy of the information or com-
plaint upon which he is charged not less than one hour before his
arraignment, hearing or examination. (Ill. Stat. Ann. 1933, ch. 111,
sec. 703 (1), 111-
1012 (1) 1933. Defendant says that he copy of the
information was furnished him.

The record does not support this claim. The only thing
showing the point is an affidavit made by defendant, which was
filed with the clerk nearly two weeks after the trial. In this af-
firmation defendant undertakes to say that no copy of the information was fur-
nished to him or to his attorney at any time before or after the
trial. Apparently this affidavit was filed with the clerk almost
leave and the attention of the court was not called to it at any
time. Neither was the court asked to pass upon it, and there is
no ruling of the court with reference to it. There is, therefore,
nothing in this respect to be reviewed by us. Moreover, the record
shows that by agreement of the parties the case was submitted to the
court for trial without a jury. We must assume that defendant was
properly informed of the charge against him.
Apparently through clerical inadvertence the fact to the

information omitted the date, reading, "this____day of November, A. D. 1934." It is argued that a charge cannot be prosecuted upon an information which contains no sufficient verification, citing People v. Weinstein, 255 Ill. 530. That case involved an information which was sworn to on July 3rd, charging an offense to have been committed on July 18th. It was held that the verification could not apply to future acts. In the instant case the information alleges November 23, 1934, as the date of the crime and the verification as made in November, 1934. It will therefore be presumed that the verification was made subsequent to November 23rd.

But even if the verification were vulnerable to attack, the record fails to show any motion to quash or a motion for a new trial or in arrest of judgment. Therefore, defendant cannot complain in a court of review that the information lacked verification. People v. Duyvejonck, 337 Ill. 636.

Defendant in his argument says that the Municipal court of Chicago never acquired jurisdiction of his person as the record shows he was arrested without process. The record recites that defendant "is now here present in open court, the Court takes jurisdiction of the person of said defendant, and the Bailiff of this Court is ordered forthwith to take the body of said defendant into his custody and said body safely keep so that said Bailiff may have the same before this Court to answer to the plaintiff for and concerning the offense charged in said information *." If, as may be, defendant was caught in the act of committing the crime mentioned in the information and brought into court and formally charged with the crime, then the court had jurisdiction of him.

The evidence not having been preserved by a bill of exceptions it will be presumed that defendant was proven guilty beyond a reasonable doubt. People v. White, 300 Ill. 239.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

information omitted the fact, pending, this... of evidence.
A. P. 1934. It is argued that a charge cannot be presented upon
an information which contains no sufficient verification, citing
People v. Weisberg, 232 Ill. 533. That case involved an informa-
tion which was sworn to on July 2nd, charging an offense to have
been committed on July 19th. It was held that the verification
could not apply to future acts. In the instant case the information
alleges November 22, 1934, as the date of the crime and the verifi-
cation as made in November, 1934. It will therefore be presumed
that the verification was made subsequent to November 22nd.
But even if the verification were vulnerable to attack, the
record fails to show any motion to quash or a motion for a new
trial or in arrest of judgment. Therefore, defendant's motion com-
plains in a court of review that the information lacked verification.
People v. Thuyetson, 237 Ill. 536.
Defendant in his argument says that the indictment counts of
Chicago never acquired jurisdiction of his person as the record shows
he was arrested without process. The proper answer that defendant
"is now here present in open court, the Court takes jurisdiction of
the person of said defendant, and the validity of said count is there-
fore with so take the body of said defendant into its custody and
said body safely keep so that said body may have the same before
this Court to answer to the plaintiff's law and commanding the officer
charged to this information." "It is well settled that a defendant
in the act of committing the crime mentioned in the information and
thereby into court and thereby acquired jurisdiction, from the court
and jurisdiction of him.
The witness who said that defendant was present by a bill of arrest
there is still no question that defendant was present legally before a
competent court. People v. White, 230 Ill. 520.
The judgment is affirmed.

RECORDED.

38003

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MANUEL ROBERTS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

279 I.A. 639¹

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

Defendant was charged with stealing three suits of men's clothing and upon trial by the court was found guilty and sentenced to the House of Correction for three months and fined \$1.00. He seeks a reversal.

The same points are made in this case as have been made in People v. Bradovitch, No. 38002 in this court. We have this day filed an opinion in that case, affirming the judgment of the Municipal court. For the reasons stated in that opinion the judgment in the instant case is affirmed.

AFFIRMED.

O'Connor, P. J., and Katchett, J., concur.

Page 1

THE PEOPLE OF THE STATE OF

ILLINOIS

Defendant in Error,

vs.

ALBERT W. BERRY

Plaintiff in Error.

2891A.633

THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS

Defendant was convicted of the offense of carrying a dangerous weapon to the armed and dangerous of the State of Illinois and was sentenced to the State Penitentiary for a term of 10 years. The defendant appeals from the judgment of the Circuit Court of Cook County, Illinois, entered on the 10th day of June, 1933.

The case arises out of the fact that the defendant was arrested on the 10th day of June, 1933, at Chicago, Illinois, on a charge of carrying a dangerous weapon to the armed and dangerous of the State of Illinois. The defendant was arrested by the Chicago Police Department and was taken to the Cook County Jail. On the 10th day of June, 1933, the defendant was arraigned in the Circuit Court of Cook County, Illinois, and was found guilty of the offense of carrying a dangerous weapon to the armed and dangerous of the State of Illinois. The defendant was sentenced to the State Penitentiary for a term of 10 years.

Witness, J. W. Berry, Jr., sworn.

38028

HENRY W. GOTTSCHALE,
Appellee,

vs.

HAROLD SHLENSKY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 639²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon three promissory notes of \$500 each; defendant's second amended affidavit of merits was stricken, and defendant electing to stand thereby, judgment was entered against him for \$1626, from which he appeals.

In the first paragraph of defendant's second amended affidavit of merits it was denied that plaintiff was the legal owner and holder of the notes upon which suit was brought, and defendant argues that this was a sufficient defense and the court was in error in striking it.

In the first amended affidavit of merits, which had been stricken, defendant asserted that plaintiff was not the legal holder and owner of the notes, but that he had possession of them as guardian of an estate and had failed to procure leave of court to institute suit upon said bonds. Plaintiff says that defendant, in opposing the motion to strike the second amended affidavit of merits, argued to the court that plaintiff held them as guardian of a minor's estate, and much of plaintiff's brief is devoted to the proposition that a guardian has the right to sue in his own name in behalf of his ward. However, as we view the matter, the first amended affidavit of merits, which contained the assertion that plaintiff was a guardian, was stricken, and the second amended affidavit of merits makes no reference to a guardianship but merely asserts that plaintiff is not the legal owner and holder of the notes. Therefore, we shall not consider the question of the right of a guardian to sue but shall

289 L.A. 839

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this suit to recover the value of the
cash; defendant's second amended affidavit of merits was filed,
and defendant elected to stand thereby. Judgment was entered against
him for \$1000, from which he appeals.

In the first paragraph of defendant's second amended affi-
davit of merits it was denied that plaintiff was the legal owner and
holder of the notes upon which suit was brought, and defendant alleged
that this was a sufficient defense and the court was in error in
striking it.

In the first amended affidavit of merits, which was later
stricken, defendant asserted that plaintiff was not the legal
holder and owner of the notes, but that he had possession of them as
guardian of an estate and had failed to exercise leave of court to
institute suit upon said bonds. Plaintiff says that defendant, in
opposing the motion to strike the second amended affidavit of merits,
argued to the court that plaintiff held them as guardian of a minor's
estate, and much of plaintiff's brief is devoted to the proposition
that a guardian has the right to sue in his own name in behalf of his
ward. However, as we view the matter, the first amended affidavit of
merits, which contained the assertion that plaintiff was a guardian,
was stricken, and the second amended affidavit of merits makes no
reference to a guardianship and merely asserts that plaintiff is not
the legal owner and holder of the notes. Therefore, we shall not
consider the question of the right of a guardian to sue but shall

pass upon the second amended affidavit of merits as made.

The court properly struck this, for the reason that in the same pleading defendant admits that plaintiff was the holder of the notes. The second paragraph of the affidavit alleges an agreement between defendant and plaintiff, as the holder of the notes, with reference to an extension and in the third paragraph of the same affidavit defendant tenders to plaintiff the interest on the notes.

The record shows that upon the trial plaintiff produced the notes in open court and the judgment entered in favor of plaintiff was noted upon the notes themselves. Defendant was not prevented from setting up any defense that he might have had against any prior holder, and as the notes are merged in the judgment, it is a complete bar to any subsequent judgment upon the same notes in favor of any other person. Hart v. Seymour, 147 Ill. 598.

By the second paragraph of the second amended affidavit of merits defendant asserted that the interest on the notes, due July 15, 1933, was in default, and that in September, 1933, an agreement was made between the plaintiff and the defendant to extend the date of payment of the principal amount of said notes from July 15, 1934, until July 15, 1935, and that in consideration of this extension defendant paid the interest due July 15, 1933.

The allegation that in September, 1933, there was an oral agreement to extend the date of payment of the principal from July 15, 1934, to July 15, 1935, was an agreement to extend the payment for the period of more than one year after the date of the making of the agreement and therefore void, being in violation of the statute of Frauds, chap. 59, sec. 1, Illinois Statutes (Cahill.)

In 27 Corpus Juris, page 185, it is said of the statute of frauds, it "applies to an oral agreement to extend the time of payment of a promissory note for a definite period of more than one

that upon the second amended affidavit of service on each.

The court properly stated this, for the reason that in the same pleading defendant made that plaintiff was the holder of the notes. The second paragraph of the affidavit alleges an agreement between defendant and plaintiff, as the holder of the notes, with reference to an extension and in the said paragraph of the same affidavit defendant contends to plaintiff the extension as the holder.

The court said that when the first affidavit was made

the notes in open court and the judgment entered in favor of plaintiff was noted upon the notes themselves. Defendant was not prevented from setting up any defense that he might have had against any prior holder, and as the notes are noted in the judgment, it is a complete bar to any subsequent judgment upon the same notes in favor of any other person. Walt. v. Johnson, 187 Ill. 398.

By the second paragraph of the second amended affidavit of service defendant asserts that the interest in the notes, July 15, 1935, was in default, and that in September, 1935, an agreement was made between the plaintiff and the defendant to extend the date of payment of the principal amount of said notes from July 15, 1935, until July 15, 1936, and that in consideration of this extension defendant paid the interest due July 15, 1935.

The allegation that in September, 1935, there was an oral agreement to extend the date of payment of the principal from July 15, 1935, to July 15, 1936, was an agreement to extend the payment for the period of more than one year after the date of the making of the agreement and therefore void, being in violation of the Statute of Illinois, Chapter 10, Sec. 1, Illinois Statutes (Smith). In my former opinion, dated July 15, 1935, it is held that the Statute of Illinois, it is applied to an oral agreement to extend the time of payment of a promissory note for a definite period of more than one

year." The same thing is said in Smith on the Statute of Frauds, sec. 346. Hide and Leather Bank v. Alexander, 194 Ill. 416, involved a written form of agreement for an extension of the time of payment of a note, which agreement was signed only by the maker of the note. It was held that as the agreement was not to be fully performed within one year and as the holder of the note had not signed it, there was no agreement of extension. This rule ^{was} also applied in Snow v. Schulman, 352 Ill. 63, where it was held that an application for a loan, not to be completed within one year and unsigned by the proposed maker of the loan, was invalid and not binding.

Defendant cites Julin v. Bauer, 82 Ill. App. 157, as holding that such agreement is not void. In that case there was an agreement to execute certain papers extending the time of payment of a loan, and the court held that since those papers could have been executed within the period of a year, these facts took the case out of the statute of frauds. In the present case defendant alleges that in September, 1935, an agreement was then and there made to extend the date of payment from July 15, 1934, to July 15, 1935. It is obvious that this agreement could not have been performed within one year from the date it was made.

Moreover, the alleged agreement is without consideration. Defendant asserts that the consideration was the payment of the interest due July 15, 1933. Defendant was the maker of the notes and was obligated to pay this interest, and the fact that the copartnership of which he was a member paid the interest is no sufficient consideration. As stated in plaintiff's brief, the fact that defendant paid his interest obligation out of partnership funds is of no greater consequence than if he had borrowed the funds from a bank.

The second amended affidavit was contradictory, evasive and insufficient in law, and was properly stricken by the court.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

year." The same thing is said in Smith on the Statute of Transfers, 2d ed., 340. Smith and Beal v. Alexander, 121 Ill. 425, 10-11, 12-13, 14-15, 16-17, 18-19, 20-21, 22-23, 24-25, 26-27, 28-29, 30-31, 32-33, 34-35, 36-37, 38-39, 40-41, 42-43, 44-45, 46-47, 48-49, 50-51, 52-53, 54-55, 56-57, 58-59, 60-61, 62-63, 64-65, 66-67, 68-69, 70-71, 72-73, 74-75, 76-77, 78-79, 80-81, 82-83, 84-85, 86-87, 88-89, 90-91, 92-93, 94-95, 96-97, 98-99, 100-101, 102-103, 104-105, 106-107, 108-109, 110-111, 112-113, 114-115, 116-117, 118-119, 120-121, 122-123, 124-125, 126-127, 128-129, 130-131, 132-133, 134-135, 136-137, 138-139, 140-141, 142-143, 144-145, 146-147, 148-149, 150-151, 152-153, 154-155, 156-157, 158-159, 160-161, 162-163, 164-165, 166-167, 168-169, 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-183, 184-185, 186-187, 188-189, 190-191, 192-193, 194-195, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208-209, 210-211, 212-213, 214-215, 216-217, 218-219, 220-221, 222-223, 224-225, 226-227, 228-229, 230-231, 232-233, 234-235, 236-237, 238-239, 240-241, 242-243, 244-245, 246-247, 248-249, 250-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-263, 264-265, 266-267, 268-269, 270-271, 272-273, 274-275, 276-277, 278-279, 280-281, 282-283, 284-285, 286-287, 288-289, 290-291, 292-293, 294-295, 296-297, 298-299, 300-301, 302-303, 304-305, 306-307, 308-309, 310-311, 312-313, 314-315, 316-317, 318-319, 320-321, 322-323, 324-325, 326-327, 328-329, 330-331, 332-333, 334-335, 336-337, 338-339, 340-341, 342-343, 344-345, 346-347, 348-349, 350-351, 352-353, 354-355, 356-357, 358-359, 360-361, 362-363, 364-365, 366-367, 368-369, 370-371, 372-373, 374-375, 376-377, 378-379, 380-381, 382-383, 384-385, 386-387, 388-389, 390-391, 392-393, 394-395, 396-397, 398-399, 400-401, 402-403, 404-405, 406-407, 408-409, 410-411, 412-413, 414-415, 416-417, 418-419, 420-421, 422-423, 424-425, 426-427, 428-429, 430-431, 432-433, 434-435, 436-437, 438-439, 440-441, 442-443, 444-445, 446-447, 448-449, 450-451, 452-453, 454-455, 456-457, 458-459, 460-461, 462-463, 464-465, 466-467, 468-469, 470-471, 472-473, 474-475, 476-477, 478-479, 480-481, 482-483, 484-485, 486-487, 488-489, 490-491, 492-493, 494-495, 496-497, 498-499, 500-501, 502-503, 504-505, 506-507, 508-509, 510-511, 512-513, 514-515, 516-517, 518-519, 520-521, 522-523, 524-525, 526-527, 528-529, 530-531, 532-533, 534-535, 536-537, 538-539, 540-541, 542-543, 544-545, 546-547, 548-549, 550-551, 552-553, 554-555, 556-557, 558-559, 560-561, 562-563, 564-565, 566-567, 568-569, 570-571, 572-573, 574-575, 576-577, 578-579, 580-581, 582-583, 584-585, 586-587, 588-589, 590-591, 592-593, 594-595, 596-597, 598-599, 600-601, 602-603, 604-605, 606-607, 608-609, 610-611, 612-613, 614-615, 616-617, 618-619, 620-621, 622-623, 624-625, 626-627, 628-629, 630-631, 632-633, 634-635, 636-637, 638-639, 640-641, 642-643, 644-645, 646-647, 648-649, 650-651, 652-653, 654-655, 656-657, 658-659, 660-661, 662-663, 664-665, 666-667, 668-669, 670-671, 672-673, 674-675, 676-677, 678-679, 680-681, 682-683, 684-685, 686-687, 688-689, 690-691, 692-693, 694-695, 696-697, 698-699, 700-701, 702-703, 704-705, 706-707, 708-709, 710-711, 712-713, 714-715, 716-717, 718-719, 720-721, 722-723, 724-725, 726-727, 728-729, 730-731, 732-733, 734-735, 736-737, 738-739, 740-741, 742-743, 744-745, 746-747, 748-749, 750-751, 752-753, 754-755, 756-757, 758-759, 760-761, 762-763, 764-765, 766-767, 768-769, 770-771, 772-773, 774-775, 776-777, 778-779, 780-781, 782-783, 784-785, 786-787, 788-789, 790-791, 792-793, 794-795, 796-797, 798-799, 800-801, 802-803, 804-805, 806-807, 808-809, 810-811, 812-813, 814-815, 816-817, 818-819, 820-821, 822-823, 824-825, 826-827, 828-829, 830-831, 832-833, 834-835, 836-837, 838-839, 840-841, 842-843, 844-845, 846-847, 848-849, 850-851, 852-853, 854-855, 856-857, 858-859, 860-861, 862-863, 864-865, 866-867, 868-869, 870-871, 872-873, 874-875, 876-877, 878-879, 880-881, 882-883, 884-885, 886-887, 888-889, 890-891, 892-893, 894-895, 896-897, 898-899, 900-901, 902-903, 904-905, 906-907, 908-909, 910-911, 912-913, 914-915, 916-917, 918-919, 920-921, 922-923, 924-925, 926-927, 9

37866

EDWARD PTACEK, (Plaintiff),
Appellee,

vs.

H. J. COLEMAN, H. J. CLARK
and M. J. MURAN, (Defendants.)

On Appeal of H. J. COLEMAN
and H. J. CLARK,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 639³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 15, 1934, plaintiff filed a suit against defendants in the Municipal court of Chicago based upon the written promises of defendants under seal to repurchase from plaintiff a contract for the conveyance of the premises known as 4132-34 Calumet avenue, in case of default by the original purchaser in making payments as the contract provided. The statement of claim alleged default by the purchasers and the refusal of defendants to perform as agreed. The cause was put at issue and submitted to the court for hearing upon an agreed statement of facts dated October 24, 1928.

The cause was heard upon this agreed statement of facts and argued by the attorneys and upon motion of plaintiff continued until June 22, 1934. On that date attorney for plaintiff moved the court for leave to submit evidence. Defendants objected, their objection was sustained and plaintiff's motion denied. Plaintiff then orally moved the court for a non-suit. Defendants objected, for the reason that the cause had been heard and submitted to the court for decision and for the further reason that no special motion, setting up the grounds for the dismissal supported by affidavit, had been presented as required by section 52 of the Practice Act (Cahill's Ill. Rev. Stats., chap. 110, sec. 52, par. 180, p. 2157.) The motion for a non-suit was allowed over defendants' objection, and the

EDWARD THAYER, (Plaintiff),
Respondent.

vs.

L. J. MORAN, M. J. CLARK
and M. J. MORAN, (Defendants).

On appeal from the
Court of Appeals.
Appellate.

THE STATE OF CALIFORNIA,
County of Santa Clara.

273 L.A. 688

MR. JUSTICE MATTHEW DELIVERY THE OPINION OF THE COURT.

On February 18, 1934, plaintiff filed a writ against defendant in the Superior Court of California based upon the violation of the provisions of the contract made by the defendant in 1932-33. Plaintiff avers, in case of default by the original purchaser in making payments as the contract provided. The statement of claim alleged default by the purchaser and the refusal of defendant to return as agreed. The case was put at issue and submitted to the court for hearing upon an agreed statement of facts dated before 24, 1934.

The case was heard upon this agreed statement of facts and argued by the attorneys and upon motion of plaintiff continued until June 22, 1934. On that date attorney for plaintiff moved the court for leave to submit evidence. Defendant objected, their objection was sustained and plaintiff's motion denied. Plaintiff then orally moved the court for a non-suit. Defendant objected, for the reason that the case had been heard and submitted to the court for decision and for the latter reason that no special motion, setting up the grounds for the dismissal supported by affidavit, had been presented as required by section 58 of the California Code of Civil Procedure. Plaintiff was allowed upon defendant's objection, and the

cause dismissed at plaintiff's costs. Defendants bring this appeal and argue error in granting the voluntary dismissal without compliance by plaintiff with the provisions of said section 52.

Section 1 of the Civil Practice Act (Cahill's Ill. Rev. Stats., chap. 110, sec. 1) provides that its provisions shall apply to all civil proceedings both at law and in equity "in courts of record" with certain exceptions there named. Section 2 of the act provides that the Supreme court of the State shall have power to make rules of pleading, practice and procedure for the City, County, Circuit, Superior, Appellate and Supreme courts supplementary to but not inconsistent with the provisions of the act, and to amend the same for the purpose of making the act effective for the administration of justice, and otherwise simplifying judicial procedure. It is significant that the Municipal court of Chicago is not included in the list of courts named in section 2. Sections 19 and 20 of the Municipal Court act give to the judges of the Municipal court power to adopt "such rules regulating the practice in said courts as they may deem necessary or expedient for the proper administration of justice in said court." Section 30 of the Municipal Court act provides:

"Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

A majority of the judges of the Municipal Court of Chicago on November 1, 1933, adopted certain rules of practice for that court in civil actions, to take effect on and after January 2, 1934. Rule 122 (Municipal Court of Chicago Civil Practice Rules & Forms, p. 90) provides for the practice in cases where the plaintiff may wish to discontinue his action. It reads:

"Save as in this rule is otherwise provided, it shall not be competent for the plaintiff to discontinue the action, but the court may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise

cause claimed as plaintiff's cause. Defendant's being this appeal and argue error in granting the voluntary dismissal without compliance by plaintiff with the provisions of said section 88.

Section 1 of the Civil Practice Act (Smith's Ill. Rev. Stat., chap. 110, sec. 1) provides that its provisions shall apply to all civil proceedings both at law and in equity "in courts of record" with certain exceptions there named. Section 2 of the act provides that the Supreme Court of the State shall have power to make rules of pleading, practice and procedure for the City, County, Circuit, Superior, Appellate and Probate Courts and to vary to but not inconsistent with the provisions of the act, and to amend the same for the purpose of making the act effective for the administration of justice, and otherwise simplifying judicial procedure. It is significant that the Municipal Court of Chicago is not included in the list of courts named in section 2. Sections 19 and 20 of the Municipal Court act give to the judges of the Municipal Court power to adopt "such rules regulating the practice in said courts as they may deem necessary or expedient for the proper administration of justice in said courts." Section 20 of the Municipal Court act provides:

"Every person desirous of entering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the box, or before the court, in case the trial is by the court without a jury, adjourns the trial."

A majority of the judges of the Municipal Court of Chicago on November 1, 1935, adopted certain rules of practice for that court in civil actions, to take effect on and after January 1, 1936. Rule 12 (Municipal Court of Chicago Civil Practice Rules & Forms) provides for the practice in cases where the plaintiff may wish to discontinue his action. It reads:

"Save as in this rule is otherwise provided, it shall not be competent for the plaintiff to discontinue the action, but the court may, before, at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise

as may be just, order the action to be discontinued, or any part of the alleged cause of action to be struck out. A discontinuance of any action by the plaintiff shall not affect the right of a defendant to prosecute any counterclaim theretofore filed."

The questions as to whether the Civil Practice act has repealed sections 19, 20 and 30 of the Municipal court act or taken away from the Municipal court of Chicago the power to make rules inconsistent with provisions of that act, have not been considered in the briefs filed in this court. Both parties seem to assume that section 52 of the Civil Practice act is applicable. In the absence of authorities to the contrary we are inclined to hold that rule 122 of the Municipal court is not invalid, and the order of the court granting a non-suit will therefore be affirmed.

AFFIRMED.

O'Connor, P. J. I concur on the sole ground that the Municipal court has not as yet passed a rule adopting section 52 of the Civil Practice act.

McSurely, J., specially concurring: I concur in holding that the non-suit is controlled by Rule 122 of the Municipal court of Chicago, effective January 2, 1934.

37877

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WALTER J. MCCOY,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

279 I.A. 639⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 21, 1934, the grand jury of Cook County returned an indictment against defendant McCoy. It was in two counts. The first charged that defendant was guilty of obtaining money by false pretences, in that on November 10, 1933, he obtained \$100 from the Palmer House Company by means of a supposed check drawn on the Citizens National Trust & Savings Bank of Los Angeles, California, in which bank he had no account whatever. The second count charged that in the same transaction he was guilty of obtaining the same money by means of the confidence game.

He was arraigned and pleaded not guilty. He waived a jury and the cause was submitted to the court. Thereafter he withdrew his plea of not guilty and entered a plea of guilty, which was accepted and entered of record. After hearing the testimony of witnesses, the court found defendant guilty of "false pretences" in manner and form as charged. Judgment was thereupon entered upon the finding and defendant was sentenced on his plea of guilty to the House of Correction for one year and to pay a fine of \$100.

The cause is here on the common law record alone.

It is urged in the first place that the finding is insufficient to support the judgment. A finding by the court, like the verdict of a jury, is not construed so strictly as an indictment. On the contrary, it is liberally construed and will be held sufficient unless from necessity there is doubt as to its meaning.

People v. Tierney, 250 Ill. 513; People v. Klein, 305 Ill. 141;

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error.

vs.

Plaintiff in Error.

OF COOK COUNTY.

S. J. A. 630

On February 22, 1934, the Grand Jury of Cook County returned an indictment against defendant money. It was in two counts. The first charged that defendant was guilty of obtaining money by false pretenses, in that on November 16, 1932, he obtained \$100 from the Farmer Home Company by means of a checkbook drawn on the Citizens National Trust & Savings Bank of Los Angeles, California, in which bank he had no account whatever. The second count charged that in the same transaction he was guilty of obtaining the same money by means of the confidence game.

He was arraigned and pleaded not guilty. He waived a jury and the cause was submitted to the court. Thereafter he withdrew his plea of not guilty and entered a plea of guilty, which was accepted and entered of record. After hearing the testimony of witnesses, the court found defendant guilty of "false pretenses" in manner and form as charged. Judgment was thereupon entered upon the finding and defendant was sentenced on his plea of guilty to the House of Correction for one year and to pay a fine of \$100.

The cause is here on the common law record alone.

It is urged in the first place that the finding is incorrect as to support the judgment. A finding by the court, like the verdict of a jury, is not considered as strictly an indictment. On the contrary, it is liberally construed and will be held against plaintiff unless from necessity there is doubt as to its meaning.

People v. Shupe, 306 Ill. 31; People v. McCurrie, 337 Ill. 290.

The finding here designated the particular count under which defendant was found guilty, and (assuming the count to be good) it was sufficient. Defendant relies on People v. Lemen, 231 Ill. 193. In that case there were six counts in the indictment and the verdict was not responsive to any one of them. For that reason it was held insufficient. The opinion of the court said that if the jury had found defendant guilty as charged in a designated count, this would have been sufficient. Here, there were only two counts. One charged false pretences, the other the confidence game. The finding was "guilty" under the false pretences count. There is nothing doubtful or uncertain about this finding.

Defendant contends that the indictment was defective in that the ownership of the property obtained is described as in the "Palmer House Company" without qualifying words as to whether it is a corporation, copartnership, or person. Since the record was filed in this court by stipulation of the parties, the indictment as it then appeared has been corrected and, as corrected, is not subject to this criticism. There was no motion to quash the indictment; there was no motion for a new trial, nor in arrest of judgment, and in the absence of a bill of exceptions, every inference is against defendant. People v. Lawrence, 232 Ill. App. 341; People v. Murphy, 188 Ill. 144.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37886

ANNETTE W. YANCEY

Appellee,

vs.

BENJAMIN F. YANCEY,

Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

279 I.A. 640¹

MR. JUSTICE SATCHETT DELIVERED THE OPINION OF THE COURT.

February 2, 1934, complainant filed an unverified bill of complaint in the Superior court of Cook county, praying that the marriage between herself and defendant, Benjamin F. Yancey, be dissolved. The bill averred that she had been a resident of Cook county for more than one year; that she was married to defendant May 6, 1920; that they had one child, Leighton, who was eleven years of age; that defendant deserted complainant September 1, 1932, and complainant prayed for temporary and permanent alimony for the support of herself and child. The summons issued and was returned not found March 5, 1934.

On the same day the bill was filed complainant filed an affidavit of non-residence, stating in substance that defendant was a non-resident, and that his last known place of residence was 414 South Catherine street, Bay City, Michigan. The certificate of the clerk filed February 6, 1934, showed that notice of the proceeding was mailed to defendant at that address on that date. No default was in fact entered on the default day which was March 7, 1934, although solicitors for complainant and defendant seem to have been under the impression that such order was entered, and on that day complainant appeared in person with her attorney and offered evidence upon the issues which is preserved by a certificate. At the close of this evidence solicitor for complainant was directed by the court to prepare a decree. March 15th solicitors for defendant served notice that on the following day they would appear before the court and ask that the supposed default be set aside and for leave to plead.

Page 1

STATE OF TEXAS
COUNTY OF DALLAS
JAMES E. LARSON
Attorney at Law
Dallas, Texas

279 I.A. 640

IN THE DISTRICT COURT OF THE COUNTY OF DALLAS, TEXAS

February 3, 1934, complainant filed an undervalued bill of
complaint in the district court of said county, praying that the
marriage between herself and defendant, Benjamin T. Larson, be dis-
solved. The bill stated that she had been a resident of said
county for more than one year; that she was married to defendant
May 3, 1930; that they had one child, Benjamin T. Larson, who was eleven years
of age; that defendant deserted complainant September 1, 1932, and
complainant prayed for temporary and permanent alimony for the sup-
port of herself and child. The summons issued was returned not
found March 2, 1934.
On the same day the bill was filed complainant filed an
affidavit of non-residency, stating in substance that defendant was
a non-resident, and that she had never given up residence in the
State of California where, May City, California. The certificate of the
clerk filed February 3, 1934, showed that notice of the proceeding
was mailed to defendant at that address on that date. No return was
in fact entered on the return day which was March 7, 1934, although
solicitors for complainant and defendant seem to have been under the
impression that such order was entered, and on that day complainant
appeared in person with her attorney and offered evidence upon the
issues which is preserved by a stipulation. At the close of this
evidence solicitor for complainant was directed by the court to
prepare a decree. March 15th solicitors for defendant served notice
that on the following day they would appear before the court and ask
that the proposed decree be set aside and the issue be tried.

They did appear and in support of their motion submitted the affidavits of Dr. Mosier and Arvid P. Tanner, a solicitor. The motion was continued from time to time, and March 26, 1934, affidavits of Carl H. Smith, an attorney at Bay City, Michigan, and of defendant were also submitted.

April 2, 1934, the court entered an order that defendant appear personally on April 4th. May 24, 1934, a decree of divorce was entered. The decree found wilful desertion by defendant from complainant without reasonable cause for the space of one year prior to the filing of the bill, as charged, and awarded the custody of the child to complainant. June 1, 1934, the motion of defendant to set aside the default was denied. June 12th thereafter defendant served notice of appeal. The notice also prayed appeal from the order of March 7th, the order of May 24th and the decree of divorce entered May 24th and that the same be set aside.

The record ^{was} filed in this court September 25, 1934; the preparation of the record having apparently disclosed that no order of default had in fact been entered March 7, 1934, on September 13th the trial court entered a default order nunc pro tunc as of March 7th. Defendant contends that the court was without jurisdiction on September 13th to enter this order because in the meantime the appeal had been perfected and the appearance of defendant entered, and he had personally appeared before the Judge in response to the order to do so. It is also contended that the evidence heard upon the trial of the cause, assuming it to be true, does not sustain the decree and that the court abused its discretion in denying defendant leave to appear and defend.

The affidavit of Dr. Mosier was to the effect that on and after November 22, 1933, defendant was under his care as physician; that the examination disclosed the patient was suffering from hyperthyroidism, with possible diabetes, and also a psychosis which

THEY ARE A PART AND IN NUMBER OF THEIR SECTION OF THE 1974-1975
GIVEN BY W. H. HOBBS AND W. H. HOBBS, A POLICE. THE POLICE
WAS CONTINUED FROM THE 1974-1975, AND FROM THE 1974-1975
GIVEN BY W. H. HOBBS, AN ATTORNEY AT LAW, AND OF THE 1974-1975
WAS CONTINUED.

[illegible][illegible]

The affidavit of Dr. Mosier was to the effect that on and after November 22, 1935, defendant was under his care as physician; that the examination disclosed the patient was suffering from

manifested a pronounced melancholy; that he treated the patient for this condition; that the hyperthyroidism had been cleared up; that the psychosis had not, and that he had referred defendant for psychopathic treatment to the department of mental diseases of the University of Michigan at Ann Arbor, Michigan; that the physician expressed the opinion that defendant was physically and mentally unable to undergo the strain of traveling to Illinois and appearing in court for the purpose of contesting the law suit; that it would, in the opinion of the physician, be six to eight months before he recovered sufficiently to undergo that experience.

Arvid B. Tanner, an attorney of Chicago, stated in his affidavit that February 19, 1934, he received a letter from Carl M. Smith, an attorney in Bay City, Michigan, asking whether he would represent defendant in the proceeding; that the letter stated defendant was an ordained minister who was suffering from a breakdown in 1933; that defendant would be unable to pay anything more than the most modest fee for legal services, and requested affiant to reply advising whether he could represent defendant; that February 24, 1934, affiant replied to the letter, stating the terms upon which he would represent defendant; that March 8th affiant received another letter from Smith stating that the terms were satisfactory; that affiant examined the dockets of the court, which indicated that the default order had been entered March 7, 1934, and that a hearing had been had; that March 13th affiant wrote Smith advising him of these facts and asking for instructions; that March 15th he received a letter from Smith instructing him to file a motion to set aside the default.

The affidavit of Carl M. Smith was to the effect that he was an attorney at Bay City, Michigan; that defendant was brought to his office February 16, 1934, by one Milo Oviatt, a resident of Bay City, who informed affiant he was a friend of defendant and had been

[illegible]

furnishing defendant with board and maintenance for several months prior thereto; that defendant was a minister, but on account of ill health had been forced to retire temporarily and was then under treatment of physicians and contemplated going to a mental clinic at the University of Michigan; that defendant informed affiant he had received a letter containing what purported to be a publication^{of}/notice that divorce proceedings had been instituted in Cook county by defendant's wife; that defendant desired to contest the proceedings because of his belief that her conduct was entirely unwarranted and unjustified; that defendant informed affiant he was poor and without funds and unable to pay his own living expenses and unable to defray the cost of medical treatment; that his only resource was a policy of insurance which provided for the payment of a monthly disability allowance in the event of his being totally disabled; that defendant with the assistance of his wife in the latter part of 1933 made application to the insurer, New York Life Insurance Co., 39 So. LaSalle street, Chicago, and that he was expecting to receive some funds from that company on account of payment for said disability; that defendant requested affiant to write to some reputable attorney in Chicago to ascertain the cost of obtaining a continuance of the case in order to enable him to regain his health and permit him to go to Chicago for the purpose of making a defense; that February 17th he wrote to the firm of Chicago attorneys for information requested by defendant, and February 24th received a letter from them consenting to act as counsel; that February 19th he forwarded the affidavit of Dr. Mosier to the law firm, and in the meantime he wrote the New York Life Insurance Co. to ascertain the reason for non-payment of the disability allowance and was advised that a purported assignment had been made of a policy to complainant, and that a check in the amount of \$300 had been issued to complainant covering the period

...withholding testimony with intent and malice to injure the defendant and to
...prior thereto; that defendant was a minister, but on account of
...his health had been forced to resign temporarily and was then
...under treatment of physicians and confined to bed in a hospital
...clinic at the University of Chicago; that defendant intended to
...that he had received a letter containing news purported to be a
...publication of the fact that defendant had been indicted in
...last month by defendant's wife; that defendant failed to con-
...fect the proceedings because of his belief that her conduct was un-
...fairly unwarranted and unjustified; that defendant informed attorney
...he was poor and without funds and unable to pay his own living ex-
...penses and unable to defray the cost of medical treatment; that his
...only resource was a policy of insurance which provided for the
...payment of a monthly disability allowance in the event of his being
...totally disabled; that defendant with the assistance of his wife in
...the latter part of 1933 made application to the Insurance, New York
...Life Insurance Co., 30 So. La Salle Street, Chicago, and that he was
...unable to receive some funds from that company on account of
...payment for said disability; that defendant requested attorney to
...write to some reputable attorney in Chicago to ascertain the cost
...of obtaining a continuance of the case in order to enable him to
...repay his brother and permit him to go to Chicago for the purpose
...of making a defense; that February 1934 he wrote to the firm of
...Chicago attorneys for information requested by defendant, and
...February 1934 received a letter from that firm suggesting to him to
...contact with February 1934 as suggested by defendant at 17
...Boston in the last time, and in the meantime he wrote the last time
...Life Insurance Co., an agreement was reached for the payment of the
...disability allowance and was advised that a payment would be made
...but that none of a policy to be made, and that a check in the
...amount of \$100 had been issued to defendant's account in payment

from December 11, 1933, to February 11, 1934, and advised him regarding the claimed assignment of the policy; that defendant then informed him he was without funds and believed the assignment of the policy was fraudulent; that affiant instructed defendant that nothing further could be done for him unless he obtained a nominal retainer for the Chicago attorneys; that March 5th defendant borrowed from Oviatt \$20 and on March 7th it was forwarded to the law firm for its retainer. The affidavit further states that affiant had received no funds for his services and he believed defendant to be wholly destitute and dependent upon friends; that he had great difficulty in dealing with him and obtaining factual data on account of his mental condition; that he conferred with physicians and they had advised him that on account of the mental strain growing out of participation in a trial at the present time defendant might become mentally unbalanced, and that defendant is in great need of specialized medical care and hospital attention, and affiant said he had at all times in connection with the handling of the legal affairs of defendant acted with diligence.

The affidavit of defendant is to the effect that he received notice through the mail February 16, 1934, advising him of the suit; that he then went to confer with Carl M. Smith, an attorney, accompanied by Milo Oviatt, who had befriended affiant and furnished him with food, shelter and maintenance for several months past without compensation; that defendant left his home in Toluca, Illinois, about November 21, 1933, because of illness which forced him to give up his profession as a Minister of the Gospel, and that his separation from complainant was not occasioned by any discord in their home but entirely by the fact that it was necessary for defendant to obtain rest and medical attention for the treatment of his disability; that complainant is a school teacher in Chicago, but that she re-

from December 11, 1933, to February 11, 1934, and advised him re-
garding the claimed assignment of the policy; that defendant then
informed him he was without funds and believed the assignment of
the policy was fraudulent; that defendant instructed defendant that
nothing further could be done for him unless he obtained a medical
certificate for his condition; that when the defendant re-
turned from visit \$20 and on March 7th it was transferred to the law
firm for its retention. The affidavit further states that defendant
had received no funds for his services and he believed defendant to
be wholly unscrupulous and fraudulent upon the facts; that he had great
difficulty in dealing with him and obtaining medical care on ac-
count of his mental condition; that he consulted with physicians
and they had advised him that on account of his mental strain
caused out of participation in a trial at the present time he
might become mentally unbalanced, and that defendant is in
great need of specialized medical care and hospital attention, and
attest said he had at all times in connection with the handling
of the legal affairs of defendant acted with diligence.

The affidavit of defendant is to the effect that he received
notice through the mail February 16, 1934, advising him of the sale;
that he then went to confer with Carl E. Miller, an attorney, accom-
panied by Miss Oyster, who had retained Miller and furnished him
with food, shelter and maintenance for several months past without
compensation; that defendant left his home in Holmes, Illinois, about
November 21, 1933, because of illness which forced him to give up
his position as a clerk of the court, and that his occupation
from November 21, 1933, was not supported by any means in funds and
was entirely by the fact that it was necessary for defendant to
obtain rest and medical attention for the treatment of his disability;
that defendant is a school teacher in Chicago, but that the re-

sided with defendant until September, 1933, with the exception of a short time when she went home on a vacation during the year and two or three week-end trips during the same year; that complainant maintained a fictitious address in Chicago during 1931; that she was in fact a resident of Toluca, Illinois, until September, 1933, although during 1931 and 1932 she maintained an apartment in Chicago for the purpose of establishing a Chicago residence to enable her to obtain a position in the public schools; that at the time of the discontinuance of the home maintained by himself and complainant in Toluca, there was nothing indicated by complainant to lead defendant to believe she intended to file suit for divorce against him, and that in truth and in fact she represented herself as being interested in the welfare of defendant and assisted him in filing his claim under a policy he had with the New York Life Insurance Co. to obtain payments to defendant for total disability; that defendant came to Bay City for the purpose of rest and medical treatment; that he was without funds on reaching Bay City and has been without funds since that time and that he is utterly dependent for defraying the cost of his maintenance and medical attention upon the proceeds of the insurance policy; that he was greatly shocked to receive the notice of commencement of divorce proceedings, and that he felt the proceeding was entirely without merit and unjustified; that he was informed by his attorney that he is charged with desertion by his wife and that she alleges she has been separated from defendant since September 1, 1932; that such allegation of separation is false in fact and that defendant and complainant resided together until September, 1933, in Toluca, and that although complainant was in Chicago until November 21, 1933, defendant until that date visited the apartment in Chicago, stayed over night with plaintiff a week before said date, and when he left the apartment with plaintiff November 21st she drove him to the car in which he was leaving

which with her went until September, 1933, with the exception of a short time when she went home on a vacation during the year and two or three week-end trips during the same year; that defendant gained a fictitious address in Chicago during 1931; that she was in fact a resident of Tolson, Illinois, until September, 1931; that 1931 and 1932 she maintained an apartment in Chicago for her purpose of establishing a Chicago residence to enable her to obtain a position in the public schools; that at the time of the investigation of the home maintained by himself and defendant in Tolson, there was nothing indicated by complaint to lead defendant to believe she intended to file suit for divorce against him, and that in fact and in fact she represented herself as being interested in the sale of defendant and assisted him in filing his claim under a policy he had with the New York Life Insurance Co. to obtain payment to defendant for total disability; that defendant came to New York for the purpose of test and medical treatment; that he was without funds on reaching New York and had been without funds since that time and that he is utterly incapable for defraying the cost of his maintenance and medical attention upon the proceeds of the insurance policy; that he was greatly shocked to receive the notice of commencement of divorce proceedings, and that he felt the proceedings were entirely without merit and unjustified; that he was informed by his attorney that he is charged with seduction by his wife and that she alleged she has been separated from defendant since September 1, 1932; that such allegation of seduction is false in fact and that defendant and defendant's witness were with defendant, 1932, in Tolson, and that although complaint was filed in Chicago until November 21, 1932, defendant until that date stayed the apartment in Chicago, stayed over night with plaintiff's mother before said date, and when he left the apartment with plaintiff's mother on the 21st of November 1932 was drove him to the car in which he was leaving

Chicago, and that their separation was entirely amicable and without thought of divorce and not actuated by any misconduct on the part of defendant.

The affidavit further continues corroborating the facts set up in the affidavit of the attorneys and the physician and goes on to state that defendant has delivered letters to his attorney written to him by complainant under date January 12, 1934, December 21, 1933, November 13, 1933, and February 27, 1934, which he believes will aid in reaching an equitable decision with reference to said cause; that he has also delivered to his attorney a telegram sent to him by complainant in September, 1933, which discloses that defendant and complainant were living together on said date, and that defendant had not deserted complainant as alleged in her bill.

There is no denial of the facts averred in these and other affidavits. We have also examined the transcript of evidence received by the court on the hearing March 7th, it being the evidence upon which the decree of divorce was later entered, and find it to be decidedly meager and unsatisfactory.

In support of his motion defendant also submitted the affidavits of several members of the church at Tolaca, Illinois, to the effect in substance that the family of defendant, his wife and young son, moved into the parsonage of the church there in the fall of 1929, and continued to reside together up to September, 1933. Defendant also submitted the affidavit of one Fecht, who says he delivered milk daily during the time the Yancey family lived there from the fall of 1929 until the middle of September, 1933; that from 1931 to 1933 Mrs. Yancey taught school in Chicago, frequently returning, however, and living with defendant in the parsonage.

The record shows that defendant frequently appeared person-

[illegible]

set up in the attic at the apartment and the apartment was
gone on to state that defendant had delivered letter to his
family written to him by complaint under date January 17, 1934,
January 17, 1934, February 17, 1934, and January 17, 1934, and
he believes all this in respect to defendant's relation with
and to said cases; that he has also delivered to his attorney a
telegram sent to him by complaint in September, 1933, which dis-
closes that defendant was living together on said
date, and that defendant had not asserted complaint as alleged in

There is no finding of the fact, occurred in these and other
circumstances. We have also examined the transcript of evidence
taken by the court on the hearing under this, and find the evidence
upon which the charges of divorce are taken entered, and find it is

1938; that from 1933 to 1935 Mrs. Kennedy taught school in Chicago, lived there from the fall of 1935 until the middle of December, never so delivered him daily during her stay the Kennedy family 1933. Petitioner also exhibited the affidavit of one Robert, who fell of 1937, and continued to reside together as he September, Young son, moved into the garageage of the common where in the and other in substance was the family of defendant, his wife and Plaintiff at various seasons in the years of 1936, 1937, 1938.

Petitioner

ally before the court in response to the rule entered so to do, but that he was never given a hearing. The manner in which the matter proceeded is indicated by the following colloquy:

"Mr. Tanner: Does your Honor care to make any statement for the record as to your reasons for the decision, as is suggested as you may do under the new Court rulings?"

The Court: No, I don't think so. However, if Mr. Yancey does not want a divorce because he is a minister, and wants to be protected on that, if you will file a cross bill for divorce for him, he will get a decree."

It would unduly extend this opinion (and it is quite unnecessary) to review cases. The evidence given upon the hearing on March 7th was insufficient to sustain a decree, and the affidavits submitted showed diligence on the part of defendant and that the actions of complainant were unwarranted. There was no denial. The court had jurisdiction, and the refusal to set aside the decree and give defendant leave to plead on the merits was an abuse of discretion. McMurray v. Peabody Coal Co., 281 Ill. 218; Leland v. Leland, 319 Ill. 426. The order denying the motion to set aside the decree and the decree itself will be reversed and the cause remanded with directions that an order be entered giving defendant leave to plead to the bill of complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

only before the court in response to the writ issued to it, and
but that it has never given a hearing. The court in such the

writer proceeded as indicated by the following colloquy:

"The Plaintiff: Now your honor says to make my statement
let the record be to your honor for the decision, as in such-
posed as you may to make the new Court ruling?
The Court: No, I don't think so. However, if the Plaintiff
does not want a divorce because it is a mistake, and wants to be
granted as such, it will file a cross bill for divorce for
that, and will get a hearing."

It would hardly extend this opinion (and it is quite

unnecessary) to review cases. The evidence given upon the hearing

on March 28th was insufficient to sustain a decree, and the Plaintiff

submitted a brief in support of the writ of habeas corpus and that the

actions of the court were unnecessary. There was no issue.

The court had jurisdiction, and the writ was not issued. The de-

gree and give defendant leave to amend on the writ was an abuse

of discretion. McIntyre v. McIntyre, 221 Ill. 115, 116, 117, 118, 119.

Y. v. Y., 115 Ill. 115. The court should have issued the writ

and the decree and the decree itself will be reversed and the

cause remanded with directions that on other be entered, giving

defendant leave to amend on the bill of complaint.

REVEREND AND HONORABLE WITH RESPECT.

Respectfully,
J. J. McINTYRE, Plaintiff.

37917

G. MAASS,
Appellant,

vs.

H. J. BALTES,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

279 I.A. 640²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff caused a judgment by confession to be entered against defendant under a power contained in a written lease under seal executed March 26, 1931, whereby plaintiff demised to defendant certain premises known as 2636 Lunt avenue for a term which was to begin May 1, 1931, and to expire April 30, 1933. The rent reserved in the written lease was \$70 a month, payable in advance. The lease contained a clause to the effect that the lessee would be released in 1932 "in case firm calls him away." The affidavit of claim stated that the sum demanded was due on account of \$10 for each month from May 1, 1931, and including April 30, 1933, which was in arrears and unpaid.

Judgment was entered May 7, 1934, and with costs amounted to \$283.50. May 25th thereafter defendant filed his verified petition to open up the judgment. The prayer of the petition was allowed, the order providing that the petition should stand as an affidavit of merits. The cause was submitted to a jury which returned a verdict for defendant, upon which the court overruled motions for a new trial and entered judgment. This appeal is taken from that judgment.

The petition admitted the execution and delivery of the lease as alleged, but averred that within a week after its execution defendant was notified by his employer that it was necessary for him, with other employees, to take a substantial cut in wages; that immediately thereafter defendant notified plaintiff of this fact and told him it would be impossible for him to fulfill the terms of the lease

2731A.640

MR. JAMES MONTGOMERY MONTGOMERY THE CHAIRMAN OF THE BOARD.

Plaintiff caused a judgment by confession to be entered against defendant under a power contained in a written lease which was executed March 28, 1931, whereby plaintiff leased to defendant certain premises known as 2232 1/2 street for a term which was to begin May 1, 1931, and to expire April 30, 1932. The lease provided in the first place that a month's notice in writing should be delivered to the tenant at least a month before the expiration of the term of the lease. The lease also provided that the tenant should be bound to pay to the landlord the sum of \$10.00 for each month from May 1, 1931, and including April 30, 1932, when was in arrears and unpaid.

Defendant was entered May 7, 1932, and when said judgment was entered May 22nd thereafter defendant filed his verified petition to open up the judgment. The prayer of the petition was directed, in order providing that the petition should stand as an affidavit of notice. The case was submitted to a jury which returned a verdict for defendant, upon which the court overruled motion for a new trial and entered judgment. This appeal is taken from that judgment. The petition admitted the execution and delivery of the lease as existing, and stated that within a week after its execution and delivery the same was notified by the defendant that it was necessary for the same to have a copy made, so that a copy could be made and filed with the court. Defendant notified plaintiff of this fact and said that it would be necessary for him to deliver the same to the court.

and instructed him to lease the flat to another, as he would be unable to pay \$70 a month on the then existing wages; that plaintiff agreed to make a new lease on the basis of \$60 a month and that it was agreed that the lease upon which judgment was entered would be cancelled and surrendered in consideration of the new agreement; that defendant began on May 1, 1931, to pay \$60 rent a month in advance and continued so to do until April 30, 1933, at which time a subsequent rental agreement was entered into whereby plaintiff leased the same property to defendant at \$50 a month; that all sums due plaintiff have been paid and defendant is not indebted to him.

On the trial plaintiff denied any promise to reduce the rent and said he had asked for the balance of it December 1, 1931, (just after defendant bought a new automobile) and defendant said that he couldn't pay then because things hadn't been going so well for him. Plaintiff also said that about three days before defendant moved in and after he had signed the lease, he asked for a temporary reduction "until things broke for him," and plaintiff told him that he would go along but that defendant would have to pay the rent later, which plaintiff says defendant agreed to do. Plaintiff testified that at another time defendant told him he couldn't pay the rent then but would get the money from his dad; that when next spoken to, defendant told him he would have to see his (defendant's) lawyer. All payments by defendant were made by checks, which are in evidence. At the end of the two years covered by the lease in question plaintiff executed another lease to defendant for the same premises for the period of one year at \$50 a month.

Mary Wagner, an employee of defendant, says that she heard a conversation between plaintiff and defendant on April 23, 1934, at the entrance of the apartment occupied by defendant, when plaintiff

and instructed him to leave the flat in January, as he would be unable to pay £70 a month on the then existing mortgage; that plaintiff agreed to make a new lease on the basis of £80 a month and that it was agreed that the lease upon which defendant was entered would be cancelled and superseded by a new lease on the same basis; that defendant began on May 1, 1931, to pay £80 a month in advance and continued to do so until April 30, 1932, at which time a new lease was entered into between the parties; that plaintiff issued the same property to defendant at £80 a month; that all sums the plaintiff have been paid and defendant is not indebted to him.

On the trial plaintiff desired any promise to reduce the rent and said he had asked for the balance of it December 1, 1931, (that after defendant had paid a new mortgage) and defendant said that he couldn't pay then because things hadn't been going so well for him. Plaintiff also said that about that time defendant had moved in and after he had signed the lease, he asked for a temporary reduction "until things broke for him," and plaintiff told him that he would go along but that defendant would have to pay £70 a month, which plaintiff says defendant never did. Plaintiff testified that at another time defendant told him he couldn't pay the rent then but would get the money from his dad; that when next spoken to, defendant told him he would have to pay his (defendant's) lawyer. All payments by defendant were made by check, which are in evidence. At the end of the two years covered by the lease in question plaintiff executed another lease to defendant for the same premises for the period of one year at £80 a month.

Wm. Wagner, an employee of defendant, says that the lease was executed between plaintiff and defendant on April 22, 1932, at the expiration of the previous lease by defendant, which was for

asked defendant about his past due rent, and that defendant told him not to worry, that he would get his money.

Defendant testified, on the contrary, that before he went into possession of the premises he told plaintiff conditions had developed whereby it was impossible for him to pay \$70 a month and asked plaintiff to reduce the rent to \$60 a month; that he paid plaintiff \$60 every month while occupying the premises.

Plaintiff argues that the verdict is against the evidence, but we think that under the circumstances the verdict of the jury must be regarded as conclusive on the facts. The testimony as to the oral conversations is conflicting, but the circumstances tend very much to corroborate the evidence given by defendant. The controlling question in the case is raised by plaintiff's contention that a parol agreement to cancel an existing lease which is under seal is without force and effect until a new lease is executed by the parties, and that when a lease under seal fixes a certain amount of rent to be paid each month, a parol agreement changing the amount of rent to be paid for the unexpired term and leaving the lease in other respects unchanged, is not binding on the lessor, and that notwithstanding such parol agreement he will be entitled to recover the rent reserved by the lease. Such, plaintiff says, has been the holding of the Supreme and Appellate courts from the leading case of Chapman v. McGrew, 20 Ill. 101, down to Loop Office Building v. Hogan, 253 Ill. App. 574.

It is also urged that the proofs do not conform to the allegations of the affidavit of merits and the evidence tends to show only a modification of the terms of the original lease and not an agreement to execute a new lease as alleged. Plaintiff says:

"In these days of 'reformed' systems of pleading, and of nontrums and panaceas devised by so-called judicial scholars, to alleviate the harshness of a rule that compels a litigant, not only to plead but to prove a case, we should not be unmindful of the

which defendant asked his name and name defendant said
him not to worry, that he would get his money.
Defendant testified, on the contrary, that before he went
into possession of the premises he told plaintiff conditions and
developed thereby it was responsible for him to pay the money and
asked plaintiff to release him from the premises; that he said
plaintiff \$500 every month while occupying the premises.
Plaintiff argues that the verdict is against the evidence.
But we think that under the circumstances the verdict of the jury
must be regarded as conclusive on the facts. The testimony as to
the oral conversation is conflicting, but the circumstances tend
very much to corroborate the evidence given by defendant. The
controlling question in the case is raised by plaintiff's contention
that there was a verbal agreement to cancel an existing lease which is
under need to without force and effect until a new lease is con-
cluded by the parties, and that when a lease under need takes a
certain amount of rent to be paid each month, a verbal agreement
canceling the amount of rent to be paid for the shortened term and
leaving the lease in other respects unchanged, is not binding on
the lessor, and that notwithstanding such verbal agreement he will
be entitled to recover the rent reserved by the lease. Such
plaintiff says, has been the holding of the Supreme and appellate
courts from the leading case of Thompson v. Hunter, 10 Ill. 121,
down to Good v. Little, 100 Ill. 404, 405.
It is also urged that the goods do not constitute the
obligations of the plaintiffs of service and the evidence tends to
show only a modification of the terms of the original lease and not
an agreement to execute a new lease as alleged. Plaintiff says:
"In these days of 'retained' systems of financing, and of
machines and processes devised by so-called technical engineers, to
illustrate the difference of a mile from someone a different, not only
is it hard to prove a case, we would not be surprised at the

fact that the old dictum of the common law, allegata et probata, still survives, as the corner-stone of judicial science."

Looking to the abstract we fail to find that the evidence offered by defendant was objected to on that ground, or that after the close of the evidence the point of variance was raised by motion to exclude or otherwise. Plaintiff is hardly in a position to expatiate on the virtues of the common law in this regard. In this class of cases in the Municipal court the cause of action is whatever the evidence makes it out to be. Elaborated Ready Roofing Co. v. Hunter, 267 Ill. App. 134; Edgerton v. Chicago, R. I. & P. R.R.Co., 240 Ill. 311. The general rule of law for which plaintiff contends is recognized by the cases above referred to and many others. The general rule as to the modification of executory written contracts under seal is stated in Alschuler v. Schiff, 164 Ill. 298, where the authorities are cited. The court there said:

"We hold it to be the law of this State, that where it is not sought to alter or change the terms of a contract under seal, still leaving it in force, but where the object is to show that such instrument has been abrogated, canceled and surrendered, the question is one of fact for the jury, and evidence thereon is admissible. In the present case we do not pass upon or determine whether or not the evidence offered by defendant was sufficient to sustain his defense. That is not our province. We do hold, however, that such evidence tending to show a surrender and acceptance should have been submitted to the jury, and it was a question of fact for the jury to determine if there was an executed agreement for the surrender of the lease. Williams v. Vanderbilt, 145 Ill. 238."

In Snow v. Griesheimer, 120 Ill. App. 516, plaintiff sued on a written lease under seal for the balance of rent claimed to be due. The defense was that by a verbal agreement the rent reserved by the lease was reduced and the entire rent as reduced paid in full. The court held that the questions as to whether such verbal arrangement had been made and, if made, had been performed, were properly submitted to the jury, and a judgment for defendant on the verdict of the jury was affirmed. The judgment of the Appellate court was affirmed in Snow v. Griesheimer, 220 Ill. 106. The Supreme court there said that as long as the contract under seal remained executory

...the situation of the corner lot, ...
...the corner-lot of ...
Looking to the statement we find that the evidence
offered by defendant was objected to on each ground, and that after
the close of the evidence the point of variance was raised by
motion to exclude or diminish. Plaintiff is hereby in a position
to establish on the virtues of the common law in this regard. In
this class of cases in the judicial court the facts of action is
whatever the evidence makes it to be. Wheeler v. Wheeler
12 N. H. 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

the plaintiff could have repudiated the oral agreement, but that the rule of law to that effect was one which defeated the intention of the parties and was not to be extended to cases ^{to} which "it does not properly apply."

In Levy v. Greenberg, 261 Ill. App. 543, the plaintiff brought suit on a lease under seal and the same defense was interposed and there was a finding for defendant. On appeal to this court the plaintiff contended that the sealed instrument could not be varied by an oral agreement; that the payment of the lesser liquidated sum did not discharge the indebtedness and that the parol agreement to reduce the rent was nudum pactum. The court reviewed the authorities and held the reductions in rent to be executed gifts which needed no consideration to support them. In Ryman v. Auschicks, 270 Ill. App. 202, decided at the April term 1933, a similar question was raised, and this court said:

"It is well settled that an executed parol agreement may be shown to defeat a recovery upon an instrument under seal. Yockay v. Marion, 269 Ill. 342; Snow v. Griesheimer, 220 Ill. 106; Worrell v. Forsyth, 141 Ill. 22; Doyle v. Dunne, 144 Ill. App. 14."

See also McKenzie et al. v. Harrison, 120 N. Y. 260.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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be varied by an oral agreement; but the payment of the money

Approved and Sent by the Bureau of the Census

Approved: _____ Date: _____

THE UNIVERSITY OF CHICAGO LIBRARY

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... ..

Time taken with her, broken egg not

10-11-1944

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most interesting letters that I have ever read.

THE UNIVERSITY OF CHICAGO

For the purpose of this study, the following hypotheses were proposed:

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

Ergonomics, 2006; Vol. 49, No. 7, 803–814

37457

MARY L. ROBINSON;

(Plaintiff) Appellee;

v,

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,

(Defendant) Appellant.

123
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 640³

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago for \$1500, in favor of the plaintiff in an action on a limited accident insurance policy issued by the defendant. The cause was submitted to the court without a jury and after a hearing, the court entered the judgment here on appeal.

The plaintiff's statement of claim and affidavit alleges that the defendant executed a policy of insurance on the life of John James Robinson whereby it promised to pay the plaintiff, Mary L. Robinson, in the event that his death was directly caused by being accidentally struck or run over while in or upon a public highway by any public or private vehicle, which policy of insurance is fully set forth in the statement of claim. The policy states in part that in consideration of the annual premium of \$1.00, the defendant insures John James Robinson for a term of twelve months against death resulting within sixty days from the date of the accident, directly or independently of all other causes from bodily injuries sustained through external, violent and accidental means, for \$1500, if such accident is sustained by being struck or run over while in or upon a public highway by any public or private vehicle. There are other provisions in the policy, all of which are set forth in full in the statement of claim, and upon which this action is based.

27437

MARY A. ROBINSON,

(Plaintiff) vs.

FEDERAL LIFE INSURANCE COMPANY,

(Defendant) AMERICAN.

OF CHICAGO.

MR. PRESIDING JUSTICE HERBERT DELIVERED THE OPINION OF THE COURT.
This is an appeal by the defendant from a judgment entered
in the Municipal Court of Chicago for \$1500, in favor of the plain-
tiff in an action on a limited accident insurance policy issued by
the defendant. The cause was admitted to the court without a jury
and after a hearing, the court entered the judgment here on appeal.
The plaintiff's statement of claim and affidavit alleges
that the defendant executed a policy of insurance on the life of
John James Robinson whereby it promised to pay the plaintiff, Mary
A. Robinson, in the event that his death was directly caused by
being accidentally struck or run over while in or upon a public high-
way by any public or private vehicle, which policy of insurance is
fully set forth in the statement of claim. The policy states in
part that in consideration of the annual premium of \$1.00, the
defendant insures John James Robinson for a term of twelve months
against death resulting within sixty days from the date of the
accident, directly or independently of all other causes from bodily
injuries sustained through external, violent and accidental means,
for \$1500, if such accident is sustained by being struck or run over
while in or upon a public highway by any public or private vehicle.
There are other provisions in the policy, all of which are set forth
in full in the statement of claim, and upon which this action is

based.

The statement of claim further alleges that while the policy was in force, John James Robinson while in or upon a public highway, to-wit: standing at the intersection of Euclid Avenue, Oak Park, Illinois and the Lake Street division of the Chicago Rapid Transit Company right-of-way, was struck or run over by a public or private vehicle, to-wit: a work train operated by the Rapid Transit Company, and by reason of said accident, directly and independently of all other causes, he died; that plaintiff performed all the conditions of the policy, and that the defendant refused to pay. An affidavit of plaintiff's claim was attached to the statement.

The defendant in reply thereto filed an affidavit of merits stating that the defendant had a good defense upon the merits to the whole of the plaintiff's demand, and that such defense was, first, that the insured did not sustain a loss of life by being struck or run over while in or upon a public highway by any public or private vehicle, and second, that the insured did not sustain a loss of life directly and independently of all other causes from bodily injuries sustained through external violence and accidental means.

On the day of the trial of this cause, the plaintiff on her own behalf was allowed to testify over the objection of the defendant that she was the beneficiary, and the next witness called by the plaintiff was the gateman, who worked for the Rapid Transit Company at Euclid Avenue in Oak Park, and described that vicinity in general terms, to-wit: that South Boulevard runs east and west, and Euclid Avenue north and south; that just north of South Boulevard were two sets of tracks of the Rapid Transit Company, laid upon the surface of the ground and commonly called the westbound tracks, carrying trains west from Chicago, and the eastbound tracks carrying trains east to Chicago. There was a 10 foot space between these two ~~separated~~ tracks. On the east side of Euclid Avenue was a lever box about 4 feet high, 5 feet long and 3 feet wide, located about

The statement of claim further alleges that while the policy was in force, John James Robinson while in or upon a public highway, to-wit: standing at the intersection of Euclid Avenue, Oak Park, Illinois and the Lake Street division of the Chicago Rapid Transit Company right-of-way, was struck or run over by a public or private vehicle, to-wit: a work train operated by the Rapid Transit Company, and by reason of said accident, directly and independently of all other causes, he died; that plaintiff performed all the conditions of the policy, and that the defendant refused to pay. An affidavit of plaintiff's claim was attached to the statement. The defendant in reply thereto filed an affidavit of merits stating that the defendant had a good defense upon the merits to the whole of the plaintiff's demand, and that such defense was, first, that the insured did not sustain a loss of life by being struck or run over while in or upon a public highway by any public or private vehicle, and second, that the insured did not sustain a loss of life directly and independently of all other causes from bodily injuries sustained through external violence and accidental means. On the day of the trial of this cause, the plaintiff on her own behalf was allowed to testify over the objection of the defendant that she was the beneficiary, and the next witness called by the plaintiff was the gateway, who worked for the Rapid Transit Company at Euclid Avenue in Oak Park, and described that vicinity in general terms, to-wit: that South Boulevard runs east and west, and Euclid Avenue north and south; that just north of South Boulevard were two sets of tracks of the Rapid Transit Company, laid upon the surface of the ground and commonly called the westbound tracks; carrying trains west from Chicago, and the eastbound tracks carrying trains east to Chicago. There was a 10 foot space between these two ~~tracks~~ tracks. On the east side of Euclid Avenue was a lower box about 4 feet high, 5 feet long and 3 feet wide, located about

midway between the westbound and the eastbound rails. This was known as the control box, from which were operated levers controlling two gates. The gates when lowered shut off the traffic going across Euclid Avenue, north and south, one gate being at the north end and the other at the south end of Euclid Avenue. Just east of the control operating the gates is a sidewalk running north and south on Euclid Avenue. Immediately east of the sidewalk is a shanty about 6 feet long, 3 feet wide and 6 feet high. East of this shanty is a long box or bin, about 8 feet long. The sidewalk came right up close to the shanty between the shanty and the lever box.

There was but one witness to the accident, who was a switchman standing on the platform of the work train, which was moving east on the westbound track. He stated that both gates were down at Euclid Avenue; that he first saw the insured on the east side of Euclid Avenue between the two rails on the westbound track, and that the insured was struck by the train and injured.

It also appears from the evidence that he was taken to the Oak Park Hospital, where he died as a result of the injuries sustained in the accident.

This case was submitted to the court upon the plaintiff's evidence and if this evidence supported the plaintiff's cause of action then the trial court properly entered judgment for the plaintiff. The trial court, however, in considering the evidence would only consider the competent evidence in the record, and such presumption will be indulged in by this court when considering the record.

The defendant contends that the evidence of the plaintiff that she is the beneficiary named in the policy in question is incompetent upon the ground that proper proof was not before the court. The plaintiff alleged in her statement of claim, under oath, that she was the beneficiary named in the policy, and therefore under this allegation she was the proper party to institute this proceeding.

midway between the westbound and the eastbound rails. This was known as the control box, from which were operated levers controlling two gates. The gates when lowered shut off the traffic going across Euclid Avenue, north and south, one gate being at the north end and the other at the south end of Euclid Avenue. Just east of the control operating the gates is a sidewalk running north and south on Euclid Avenue. Immediately east of the sidewalk is a shanty about 8 feet long, 8 feet wide and 8 feet high. East of this shanty is a long box or bin, about 8 feet long. The sidewalk came right up close to the shanty between the shanty and the lever box.

There was but one witness to the accident, who was a switchman standing on the platform of the work train, which was moving east on the eastbound track. He stated that both gates were down at Euclid Avenue; that he first saw the insured on the east side of Euclid Avenue between the two rails on the westbound track, and that the insured was struck by the train and injured.

It also appears from the evidence that he was taken to the Oak Park Hospital, where he died as a result of the injuries sustained in the accident.

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The defendant contends that the evidence of the plaintiff that she is the beneficiary named in the policy in question is incompetent upon the ground that proper proof was not before the court. The plaintiff alleged in her statement of claim, under oath, that she was the beneficiary named in the policy, and therefore under this allegation she was the proper party to institute this proceeding.

If the defendant wished to take issue upon this question, the defendant should have raised the question by its pleadings. This was not done, and the defendant having failed to challenge plaintiff upon this question, it waived the necessity of proof by the plaintiff that she was the beneficiary named. The fact that she testified she was, which was admitted by the defendant, did not harm the defendant.

The evidence in the record as to the liability of the defendant under the terms of its policy is questioned by the defendant as not being competent. The defendant also contends that the evidence considered by the court did not establish the defendant's liability.

The facts are that in order to protect the public, the insured was employed by the Transit Company as a gateman to operate the gates at the track at the intersection of Euclid Avenue and South Boulevard in Oak Park. These tracks were immediately south of the elevated structure of the Chicago & Northwestern Railroad. At this point there is a subway under the elevation for pedestrians and vehicles using Euclid Avenue. At the time of the accident the insured was last seen standing upon the sidewalk used by pedestrians, which is adjacent to the gateman's shanty on the east. The only witness to the accident was the switchman Joseph J. Herold, who stated that he could not tell whether the insured was on or off the sidewalk when he was struck by the car.

From the evidence appearing in the record, we are of the opinion that the court was justified in finding for the plaintiff, not alone that the injury caused his death, but that the accident happened on a public highway. The sidewalk at the place where the deceased was working has been used by the public for a number of years, in fact, one witness, B. C. Branstadt testified that he was familiar with the location and that the intersecting streets

It was defendant's duty to take every precaution to prevent an accident. The defendant should have raised the question by its pleading. This was not done, and the defendant having failed to establish its liability upon this question, it waived the necessity of proof by the plaintiff that she was the beneficiary named. The fact that she testified she was, which was admitted by the defendant, did not harm the defendant.

The evidence in the record as to the liability of the defendant under the terms of its policy is questioned by the defendant as not being competent. The defendant also contends that the evidence considered by the court did not establish the defendant's liability.

The facts are that in order to protect the public, the insured was required by the Standard Company to install gates at the track at the intersection of Euclid Avenue and South Boulevard in Oak Park. These tracks were immediately south of the elevated structure of the Chicago & Northwestern Railroad. At this point there is a subway under the elevation for pedestrians and vehicles using Euclid Avenue. At the time of the accident the injured was last seen standing near the sidewalk west of the tracks which is adjacent to the gateman's stand on the east. The only witness to the accident was the switchman Joseph J. Kernell, who stated that he could not tell whether the injured was on or off the sidewalk when he was struck by the car.

From the evidence appearing in the record, we are of the opinion that the court was justified in finding for the plaintiff not alone that the injury caused his death, but that the accident happened on a Euclid Avenue. The plaintiff is not alone the person who was working has been used by the public for a number of years, in fact, one witness, E. G. Braman testified that he was familiar with the location and that the intersecting streets

had been used by both individuals and vehicles since the year 1901, and that these intersecting streets were each 80 feet in width.

The defendant complains that the court admitted in evidence plats produced by the plaintiff which were not properly identified; that plats were received by the witnesses, such as testified, from the Office of the Municipality of Oak Park, where they were kept.

Where it is necessary to establish the existence of a roadway directly in issue, it must be proved either that the roadway was laid out in pursuance of a law of the State, or that it has been established or used by the public as a highway for 20 years. But where its existence is only collaterally in issue, as in the instant case, it is sufficient to show that it has been used and travelled as a highway by the public. Board of Supervisors v. The People, ex rel. 116 Ill. 466.

We believe that the plaintiff established a prima facie case that the place of the accident was on a public highway, and it will be presumed in the absence of evidence to the contrary that possession was in the municipality. City of Anna v. Boren, 77 Ill. App. 408.

The plats in evidence were produced by a clerk of the Village of Oak Park and are on file in the Village Office. They indicate that both Euclid Avenue and South Boulevard are 80 feet in width, and that the Transit Company in the operation of trains used the north 28 feet of South Boulevard.

The physical condition of the insured was described in detail by the attending physician. The insured was taken to the hospital where he died as a result of the injuries sustained.

had been used by both individuals and vehicles since the year 1901, and that these intersecting streets were each 30 feet in width.

The defendant contends that the court admitted in evidence plates produced by the plaintiff which were not properly identified; that plates were received by the witnesses, such as testified, from the Office of the Municipality of Oak Park, where they were kept.

Where it is necessary to establish the existence of a roadway directly in issue, it must be proved either that the roadway was laid out in pursuance of a law of the State, or that it has been established or used by the public as a highway for 20 years. But where its existence is only collaterally in issue, as in the instant case, it is sufficient to show that it has been used and travelled as a highway by the public. Board of Supervisors v. The People, ex rel. J. H. 436.

We believe that the plaintiff established a prima facie case that the place of the accident was on a public highway, and it will be presumed in the absence of evidence to the contrary that possession was in the municipality. City of Anna v. Boren, 77 Ill. 436.

The plates in evidence were produced by a clerk of the Village of Oak Park and are on file in the Village Office. They indicate that both Euclid Avenue and South Boulevard are 30 feet in width, and that the Transit Company in the operation of trains used the north 35 feet of South Boulevard.

The physical condition of the insured was described in detail by the attending physician. The insured was taken to the hospital where he died as a result of the injuries sustained.

The cross- appeal of the plaintiff has been considered and we are not prepared to say that the trial court erred in refusing to admit evidence as to the additional costs of the plaintiff, incurred by reason of the defendant's refusal to admit certain facts.

For the reasons stated in the opinion we are satisfied that the court did not err in its rulings, and accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

The cross-examination of the plaintiff has been considered and we are not prepared to say that the facts stated in relation to such evidence as to the defendant's state of mind, taken by reason of the defendant's refusal to admit certain facts. For the reasons stated in the opinion we are satisfied that the court did not err in its ruling, and accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

37466

LIBERTY BANK OF CHICAGO, Guardian of the
Estate of RAYMOND RIVERA, a minor and
JOSEPH D. SHANE,

Appellees,

v.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE
CORPORATION, Ltd.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 640⁴

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment entered in the Municipal Court of Chicago for \$302.40 in an action by the plaintiff to recover the amount due upon a draft for \$300, payable to the plaintiff and issued by the defendant, and when presented to the bank, payment refused.

The facts are that the defendant insurance company issued a policy of automobile insurance to Myro Leavitt. The policy by its terms covered the operation of an automobile owned by Leavitt against loss by reason of the liability imposed by law upon the assured for damages arising from bodily injury to any person by reason of the operation of the insured's car. A further provision contained in the policy excluded the insurer's liability where the car of the insured was operated by an agent or employee of any public garage, automobile repair shop, automobile sales agency or service station at the time the injuries occurred to a person.

It appears that an accident occurred and was reported by Myro Leavitt to the Insurance Company; that a boy named Raymond Rivera was hurt by the operation of his, Leavitt's car; that an adjuster for the Insurance Company adjusted the claim and issued a draft payable to the plaintiff, upon which payment was refused. After the adjustment of the claim and issuance of the draft to plaintiff, the defendant investigated the claim and from the facts, denied liability under the

THOMAS J. BROWN, JR., Plaintiff,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

WITNESSES:

JOHN J. BROWN, Jr.,
Attorney for Plaintiff.

JOHN J. BROWN, Jr.,
Attorney for Defendant.

GENERAL AGREEMENT AND ASSURANCE
POLICY, No. 123456789

Witnesses:

279 I.A. 640

MR. PRESIDING JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment entered in the Municipal Court of Chicago for \$308.40 in an action by the plaintiff to recover the amount due upon a draft for \$300, payable to the plaintiff and issued by the defendant, and when presented to the bank, payment refused.

The facts are that the defendant insurance company issued a policy of automobile insurance to Myro Leavitt. The policy by its terms covered the operation of an automobile owned by Leavitt against loss by reason of the liability imposed by law upon the insured for damages arising from bodily injury to any person by reason of the operation of the insured's car. A further provision contained in the policy excluded the insurer's liability where the car of the insured was operated by an agent or employee of any public garage, automobile repair shop, automobile sales agency or service station at the time the injuries occurred to a person.

It appears that an accident occurred and was reported by Myro Leavitt to the insurance company; that a boy named Raymond Rivers was hurt by the operation of his, Leavitt's car; that an adjuster for the insurance company adjusted the claim and issued a draft payable to the plaintiff, upon which payment was refused. After the adjustment of the claim was made by the insurer, the defendant investigated the claim and from the facts, denied liability under the

provisions of the policy issued by this Company to the insured, Myro Leavitt.

The fact is that at the time of the accident the Leavitt automobile was operated by one Frank Yates, who was employed by Miller's Service and Gasoline Station, which was owned by Ben Miller and located at 718 West 13th Street, in Chicago; that by direction of Miller, the chauffeur was delivering the car to the owner, Myro Leavitt at the time of the accident.

Liability of the defendant, if any, must be founded upon the issuance of the draft to plaintiff. The general rule is that a check or draft is but a conditional payment and issued to obtain money from the bank, and if payment is refused, the claimant still has a right of action for the injuries sustained. Leake v. Brown, 43 Ill. 372; Stephens Eng. Co. v. Ind. Com. 290 Ill. 88; Canadian Bank of Commerce v. McGreg. et al., 106 Ill. 281.

There is a lack of evidence that by the refusal of the defendant to honor the draft, the plaintiff suffered a money loss. The provision of the policy in question excluded the liability of the defendant where the injuries received by the minor were sustained while Leavitt's car was being driven by an employee of the service and parking station. The policy-holder could not recover from the defendant, and the defendant was under no legal obligation to answer for the injuries sustained as a result of the accident to the minor, Raymond Rivera. There was no privity of contract between the plaintiff and the defendant. Kinnan, by next friend v. Fidelity and Casualty Co. 107 Ill. App. 406; U. S. Fidelity & Guaranty Co. v. Maryland Casualty Co., 182 Ill. App. 438.

The defendant's answer upon the question of liability of the defendant Insurance Company is that a compromise of a doubtful right is a sufficient consideration for an agreement of compromise between the parties. The right, however, to recover by the plaintiff

provision of the policy issued by the company to the insured.
The fact is that at the time of the accident the plaintiff

automobile was operated by one Frank Yates, who was employed by
Miller's Service and Gasoline Station, which was owned by Ben Miller
and located at 718 West 13th Street, in Chicago; that by direction
of Miller, the chauffeur was delivering the car to the owner, Yates,
leaving at the time of the accident.

Liability of the defendant, it may, must be founded upon
the issuance of the writ to plaintiff. The general rule is that
a check or draft is not a conditional payment and issued to obtain
money from the bank, and if payment is refused, the claimant still
has a right of action for the injuries sustained. Smith v. Brown,
43 Ill. 273; Stearns v. Co. v. Ind. Gas. Co. Ill. 33; Canadian
Bank of Montreal v. Bank of Montreal, 100 Ill. 321.

There is a lack of evidence that by the refusal of the
defendant to issue the draft, the plaintiff suffered a monetary loss.
The provision of the policy in question excluded the liability of
the defendant where the injuries received by the minor were sustained
while plaintiff's car was being driven by an employee of the service
and parking station. The policy-holder could not recover from the
defendant, and the defendant was under no legal obligation to answer
for the injuries sustained as a result of the accident to the minor.
There was no privity of contract between the
plaintiff and the defendant. Kimman, by next friend v. Fidelity and
Guaranty Co. 197 Ill. App. 408; F. & G. Fidelity & Guaranty Co. v.
Northwestern Guaranty Co., 198 Ill. App. 450.

The defendant's answer upon the question of liability of
the defendant Insurance Company is that a compromise of a doubtful
claim is a sufficient consideration for its payment of damages
between the parties. The right, however, to recover by the plaintiff

for the injuries sustained by the minor is not one against the defendant, but the right of action, if any, is against Myro Leavitt.

The facts indicate that the defendant was not liable to the insured for the damages sustained by the plaintiff by reason of the contract of insurance, and of course the defendant would not compromise a claim as doubtful where the plaintiff's right to recover was not against the defendant.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

for the injuries sustained by the minor is not one against the defendant, but the right of action, if any, is against the defendant. The facts indicate that the defendant was not liable for the injuries sustained by the plaintiff by reason of the contract of insurance, and of course the defendant would not be liable for the injuries sustained by the plaintiff by reason of the contract of insurance. For the reasons stated, the judgment is reversed and the cause remanded.

REVEREND AND HONORABLE

WILLIAM H. HALL, J. J. COCHRAN.

37494

CATHERINE GRIMES,

(Plaintiff) Defendant in Error,

v.

HENRY F. CONNOLLY,

(Defendant) Plaintiff in Error.

125
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 640⁵

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error by the defendant seeking a review of the record. Judgment was entered against the defendant in the Municipal Court of Chicago for \$140. The action was brought by the plaintiff to recover \$140 from the defendant for room and board furnished to the defendant by the plaintiff. The defendant filed his written appearance and the court heard the evidence offered by the parties and entered judgment as above indicated.

The defendant questioned jurisdiction of the trial court to vacate an order dismissing the above entitled cause for want of prosecution, upon the ground that the motion to vacate was made more than 30 days after the dismissal order was entered. The defendant's motion questioning jurisdiction was denied by the trial court and the defendant proceeded to trial upon the issues.

By defendant's appearance he was properly in court, and the court having jurisdiction of the person and the subject matter, the defendant cannot in this proceeding question the jurisdiction of the court. From the facts as they appear in the record, the right to do so was waived.

The evidence offered by the parties and received by the trial court upon the issues, required the court to pass upon the

CATHERINE CHURCH,

(Plaintiff) Defendant in Error,

v.

HENRY E. COUGHLIN,

(Defendant) Plaintiff in Error.

STATE OF CALIFORNIA

MR. JAMES H. JONES, JUDGE OF THE COURT OF THE

This cause is in this court upon a writ of error by the

defendant against a verdict of the jury. The defendant was found guilty of the crime of murder in the first degree. The defendant was brought by the sheriff to the court room and heard by the jury. The defendant was found guilty of the crime of murder in the first degree.

Defendant filed his written statement and the court heard the

evidence offered by the parties and entered judgment on the evidence. The defendant was found guilty of the crime of murder in the first degree.

In view of the fact that the defendant was found guilty of the crime of murder in the first degree, the court entered judgment on the evidence. The defendant was found guilty of the crime of murder in the first degree. The defendant was found guilty of the crime of murder in the first degree.

By defendant's statement he was properly in court,

and the court having jurisdiction of the person and the subject matter, the defendant cannot in this proceeding question the jurisdiction of the court. From the facts as they appear in the record, the right to do so was waived.

The evidence offered by the parties and entered by the

trial court upon the record, showed the court was properly

weight and credibility, and from the appearance of the witnesses determine their frankness and fairness, and interest, if any, in the result of the case, and from the facts and circumstances in evidence the court did determine the weight as being with the plaintiff.

The facts indicate that the plaintiff furnished room and board to the defendant, and the only defense called to our attention is the question of payment. The court passed upon the question, and from the record it appears that the defendant failed to establish the defense of payment by the weight of the evidence, and the court properly entered judgment for the plaintiff for the amount due. The judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

weight and credibility, and from the appearance of the witnesses
determine their truthness and fairness, and, incidentally, if any, in
the result of the case, and from the facts and circumstances in
evidence the court did determine the weight as being with the

plaintiff.

The facts relative to the plaintiff's financial condition

and heard to the defendant, and the only defense called to our
attention is the question of payment. The court ceased upon the
question, and from the record it appears that the defendant failed
to establish the defense of payment by the weight of the evidence,
and the court properly entered judgment for the plaintiff for the
amount due. The judgment is affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. HALL, J., CONCURS.

37524

T. J. FORSCHNER CONTRACTING COMPANY,
a corporation,

Defendant in Error,

v.

THE SANITARY DISTRICT OF CHICAGO, a
Municipal Corporation, organized under
the laws of the State of Illinois,

Plaintiff in Error.

WRIT OF ERROR

TO SUPERIOR COURT

COOK COUNTY.

279 I.A. 641¹

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Superior Court of Cook County, issued at the request of the defendant to review the record, wherein a judgment was entered on October 27, 1933, for the sum of \$48,764.81 in favor of the plaintiff.

The action was in assumpsit by the plaintiff to recover for certain work performed during 1924 and 1925, required by a contract entered into by the plaintiff with the defendant for the construction of the Calumet Intercepting Sewer, Contract No. 1 and the 95th Street Sewage Pumping Station in the City of Chicago, Illinois, which action was for the recovery of the amount for which judgment was entered. The cause was tried before the court and a jury, and at the close of all the evidence, the court directed the jury to return a verdict in the amount of \$48,764.81 in favor of the plaintiff, and judgment was entered on the verdict.

The defendant admits that there is a proper balance due the plaintiff of \$13,312.39, and that judgment should have been entered for only that amount. The evidence presented consisted of a stipulation of the facts and the testimony of witnesses offered by the parties in the litigation.

The facts as stipulated are substantially as follows:

E. J. WOODWARD CONTRACTING COMPANY,
a corporation,

Defendant in Error,

v.

THE SANITARY DISTRICT OF CHICAGO, a
Municipal Corporation, organized under
the laws of the State of Illinois,

Plaintiff in Error.

FILED IN COURT

TO SUPERIOR COURT

COOK COUNTY.

1934.1.18

ALL TESTIMONY HEREIN GIVEN UNDER THE OATH OF THE COURT.

This cause is in this court upon a writ of error directed to the Superior Court of Cook County, issued at the request of the defendant to review the record, wherein a judgment was entered on October 27, 1933, for the sum of \$2,784.31 in favor of the plaintiff.

The action was in assumpsit by the plaintiff to recover for certain work performed during 1924 and 1925, pursuant to a contract entered into by the plaintiff with the defendant for the construction of the Belmont Intersecting Sewer, Contract No. 1, and the 32nd Street Sewage Pumping Station in the City of Chicago, Illinois, which action was for the recovery of the amount for which judgment was entered. The same was first before the court and jury, and at the close of all the evidence, the court directed the jury to return a verdict in the amount of \$2,784.31 in favor of the plaintiff, and judgment was entered on the verdict.

The defendant admits that there is a proper balance due the plaintiff of \$2,784.31, and that judgment should have been entered for only that amount. The evidence presented consisted of a stipulation of the facts and the testimony of witnesses offered by the parties in the litigation.

The facts as stipulated are substantially as follows:

The plaintiff and the defendant entered into a contract in writing, dated December 13, 1923, for the construction of the Calumet Intercepting Sewer, Contract No. 1, and the 95th Street Sewage Pumping Station, in the City of Chicago, Illinois. The major part of the work was performed during 1934 and 1935. It is agreed that the plaintiff completed all the work under the contract to the satisfaction of the Chief Engineer of the District, in the manner and within the time prescribed in the contract, subject to an item of credits for an adjustment of pumps, which will be referred to hereinafter.

During the performance of the work under the contract, Edward J. Kelly was Chief Engineer of the Sanitary District, Philip H. Harrington was the Assistant Chief Engineer, William H. Trankaus, was the Construction Engineer, and John D. Hurley was the Resident Engineer in direct charge of the construction work for the Sanitary District under the contract.

John D. Hurley was in the employ of the District as an Assistant Engineer, and was in actual charge of the construction work as the same progressed from the time the work was commenced until its completion. Among other duties, he supervised and inspected all work performed from day to day, established the lines and grades for said work and measured the quantities of work actually performed under the contract. In accordance with and subject to the provisions of the contract, the Chief Engineer issued his certificates as to the estimated quantities, amounts and values of the work performed under the contract, and during the progress of the work twelve vouchers were issued. After the vouchers had been signed by the Chief Engineer, and upon the payment of the amount due on each of said vouchers, the same were receipted by the plaintiff and filed in the office of the District. Work was performed by the plaintiff pursuant to the contract, plans and specifications, and the directions of the Engineer, and it

The plaintiff and the defendant entered into a contract in writing,

dated December 15, 1933, for the construction of the Chicago

Interlocking Switch, located at No. 1, and the main street bridge

jumping station, in the City of Chicago, Illinois. The major part

of the work was performed during 1934 and 1935. It is agreed that

the plaintiff completed all the work under the contract to the

satisfaction of the Chief Engineer of the District, in the manner

and within the time prescribed in the contract, subject to an item

of credits for an adjustment of wages, which will be returned to

the plaintiff.

During the performance of the work under the contract,

Edward J. Kelly was Chief Engineer of the Sanitary District, while

E. J. Livingston was the Assistant Chief Engineer, William M. Tinkham,

was the Construction Engineer, and John D. Hurley was the Resident

Engineer in direct charge of the construction work for the Sanitary

District during the contract.

John D. Hurley was in the employ of the District as an

Assistant Engineer, and was in actual charge of the construction work

as the same progressed from the time the work was commenced until

its completion. Among other duties, he supervised and inspected

all work performed from day to day, established the lines and grades

for said work and measured the quantities of work actually performed

under the contract. In accordance with and subject to the provisions

of the contract, the Chief Engineer issued his certificate as to the estimated

quantities, amounts and values of the work performed under the

contract, and during the progress of the work twelve vouchers were

issued. After the vouchers had been signed by the Chief Engineer,

and upon the payment of the amount due on each of said vouchers, the

vouchers were assigned by the plaintiff and filed in the office of the

District. Work was performed by the plaintiff pursuant to the contract

terms and specifications, and the directions of the Engineer, and it

is admitted that plaintiff is entitled to payment, if any, at the unit and lump sum prices provided in said contract, and as set forth in the stipulation of the parties.

It is agreed that the defendant is entitled to a credit of \$1,000 for a change made in certain details under the terms of the contract and \$12,000 for settlement of differences concerning the efficiency of pumps furnished under the terms of the contract, making a total credit of \$13,000 to be allowed to the defendant from the total sum which may be found to be due the plaintiff.

The plaintiff has been paid, on account of the work completed under the unit and lump sum process under said contract, the sum of \$1,020,049.59.

It was agreed that the remainder of the money due the plaintiff had not been willfully or vexatiously withheld by the defendant, but that the final amount due on the contract has been withheld pending the adjustment of certain honest differences.

From the recapitulation of the work done, the amount of the work admitted by the defendant for which the plaintiff is entitled to payment, and the amount of work done by the plaintiff for which the defendant contends the plaintiff is not entitled to payment, the amount of credit allowed by the plaintiff to the defendant, and the amount paid by the defendant to the plaintiff, is as follows:

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Total amount of the work for which it is admitted by the Sanitary District plaintiff is entitled to the payment | \$1,046,361.98 |
| Total value of the work performed by the plaintiff pursuant to the contract, plans and specifications and the oral directions of the engineer for which the Sanitary District contends the plaintiff is not entitled to payment | 35,452.42 |
| Total amount of the work performed by the plaintiff | \$1,081,814.40 |
| Amount of credit allowed by the plaintiff to the Sanitary District of Chicago | 13,000.00 |
| Balance after allowing said credit | \$1,068,814.40 |

is admitted that plaintiff is entitled to payment, if any, on the unit and lump sum prices provided in said contract, and as set forth in the stipulation of the parties.

It is agreed that the defendant is entitled to a credit of \$1,000 for a change made in certain details under the terms of the contract and \$13,000 for settlement of differences concerning the efficiency of pumps furnished under the terms of the contract, making a total credit of \$14,000 to be allowed to the defendant from the total sum which may be found to be due the plaintiff.

The plaintiff has been paid, on account of the work completed under the unit and lump sum process under said contract, the sum of \$1,000,000.00.

It was agreed that the remainder of the money due the plaintiff has been withheld by the defendant on the contract has been withheld pending but that the final amount due on the contract has been withheld pending the adjustment of certain honest differences.

From the recapitulation of the work done, the amount of the work admitted by the defendant from which the plaintiff is entitled to payment, and the amount of work done by the plaintiff for which the defendant contends the plaintiff is not entitled to payment, the amount of credit allowed by the plaintiff to the defendant, and the amount paid by the defendant to the plaintiff, is as follows:

| | |
|-----------------------------------------------------------------------------------------------------------------------------|----------------|
| Total amount of the work for which it is admitted by the Sanitary District plaintiff is entitled to the payment | \$1,000,000.00 |
| Total value of the work performed by the plaintiff pursuant to the contract, plans and specifications | \$1,000,000.00 |
| Plans and the total amount of the payment for which the Sanitary District contends the plaintiff is not entitled to payment | \$1,000,000.00 |
| Total amount of the work performed by the plaintiff to the Sanitary District of Chicago | \$1,000,000.00 |
| Amount of credit allowed by the plaintiff to the Sanitary District of Chicago | \$14,000.00 |
| Balance after allowing said credit | \$986,000.00 |

Amount of payments heretofore made by the
Sanitary District to the plaintiff 1,020,049.59

Balance claimed by the plaintiff for work
performed pursuant to said contract, plans
and specifications and the oral directions
of the engineer at the unit and lump sum
prices therein provided \$48,764.81

The plaintiff at the trial waived its right to present a claim for interest and did not press the same.

The defendant when advertising for bids for the proposed work, furnished bidders with "Requirements for bidding and instructions to bidders." The paragraph, which is in the instructions to bidders is also included in the contract and is as follows:

"The following schedule of quantities, although stated with as much accuracy as is possible in advance, is approximate only and is assumed solely for the purpose of comparing bids. The quantities on which payments will be made to the Contractor are to be determined by measurements of the work actually performed by the Contractor, or as specified in said contract."

The fact is that only after excavations were made by the plaintiff was it possible for the engineer to determine the depth necessary for a proper footing. In this connection the contract provided:

"It is expected that satisfactory material for foundation will be found at the elevations shown on the drawings, but in case the materials encountered are not suitable, or in case it is found desirable or necessary to go to an additional depth or width to provide proper bearing for the masonry, the excavation will be carried to such additional depth and width as the engineer may direct. Additional excavations so ordered, and concrete ordered for filling such additional excavation will be paid for at the respective unit prices herein specified for additional excavation and additional concrete."

It is apparent from the stipulation between the parties that the total amount of \$35,452.42 is in dispute by the defendant. The items for the work performed are for additional excavation and concrete used at the unit prices specified in the contract, and these amount to \$30,530.67, and the balance is for sewer pipe, manholes, castings, iron pipe, sheeting, reinforcing steel, and

Amount of payments heretofore made by the
Plaintiff to the Defendant . . . \$1,000.00

Balance claimed by the Plaintiff for work
performed pursuant to said contract, plans
and specifications and for cost of material
and labor employed at the work and item was
\$1,000.00

The Plaintiff at the trial waived the right to present a
claim for interest and did not press the same.

The Defendant when advertising for bids for the proposed
work, furnished bidders with "Requirements for Bidding and Instruc-
tions to Bidders." The paragraph, which is in the instructions to
bidders is also included in the contract and is as follows:

"The following schedule of quantities, although stated
with as much accuracy as is possible in advance, is
approximate only and is assumed solely for the purpose
of comparing bids. The quantities on which payments
will be made to the Contractor are to be determined by the
engineer and are not necessarily binding on the
Contractor, as is specified in said contract."

The fact is that only after excavations were made by the
Plaintiff was it possible for the engineer to determine the depth
necessary for a proper footing. In this connection the contract

provided:

"It is expected that satisfactory material for foundation
will be found at the elevation shown on the drawings.
If in case the material encountered was not satisfactory,
or in case it is found necessary by necessity to go to
an additional depth or width or provide further bearing, the
Contractor, the foundation will be required to make such
foundations and work as the engineer may direct.
Additional excavations or enlargements, and concrete ordered for
filling such additional excavation will be paid for as
the engineer may direct. Where herein specified for additional
excavation and additional concrete."

It is apparent from the stipulations between the parties
that the total amount of \$5,422.42 is in dispute by the defendant.
The item for the work performed for additional excavation and
concrete used at the well prices specified in the contract, and
total amount is \$5,422.42, and the balance is for sewer pipe,
manholes, venting, iron pipe, sheeting, reinforcing steel, and

brickwork, and amounts to \$4,931.75, all of which items are likewise charged at the unit prices fixed in the contract.

The work performed at the oral direction of the defendant's engineer is not disputed, the measurements and quantities were all taken by this engineer and reported to the Sanitary District in itemized vouchers prepared by him from time to time, showing the amount of work done under each item of the contract and the contract price therefor,

The contract contains the following provision:

"Whenever under the provisions hereof an order from the Engineer to the Contractor is required, such order shall be understood to mean a written order addressed to the Contractor and signed by the Chief Engineer of the Sanitary District."

When the work was completed in the summer of 1925, the defendant took possession of the plant and has been operating it ever since. No objection was made that this work was unnecessary. The defendant contends that because the contract provides that the plaintiff shall do the work upon a written order from defendant's engineer, it is not liable, and relies upon the provision of the contract last above quoted.

The defendant had knowledge that the work was being done by the plaintiff pursuant to the direction of the defendant's engineer, and reported by the engineer in writing to the defendant. While a written order was not given by the engineer directing the plaintiff to do this work, directions were given orally, and the work went on, quantities were measured by the defendant's engineer, and the price charged and reported to the defendant.

The time to question this work ordered by the engineer was when the defendant received its engineer's report, and then make objection to the authority of the plaintiff to do this work. However, no objection was made that the work was not performed, or that it was unnecessary; on the other hand, the record shows that the work

brickwork, and amounts to \$4,361.75, all of which items are likewise charged at the unit prices listed in the contract.

The work performed at the oval line of the defendant's engineer is not disputed, the measurements and quantities were all taken by this engineer and reported to the plaintiff's engineer in itemized vouchers prepared by him from time to time, showing the amount of work done under each item of the contract and the contract prices therefor.

The contract contains the following provision:

"Whenever under the provisions herein an order is issued by the plaintiff to the defendant is required, such order shall be countersigned by the defendant and signed by the plaintiff's engineer."

When the work was completed in the summer of 1908, the defendant took possession of the plant and has been operating it ever since. In objection and was this work was necessary. The defendant claims that between the plaintiff and the plaintiff shall do the work upon a written order from defendant's engineer, it is not liable, and relies upon the provision of the contract last above quoted.

The defendant and plaintiff have the work being done by the plaintiff pursuant to the direction of the defendant's engineer and reported by the engineer in writing to the defendant. While a written order was not given by the engineer directing the plaintiff to do this work, the defendant's engineer, and the other quantities were measured by the defendant's engineer, and the other charged and reported in the contract.

The time to question this work ordered by the engineer was when the defendant received the engineer's report, and then make objection to the authority of the plaintiff to do this work. However, as it is not shown that the work was not performed, or that it was unnecessary; on the other hand, the record shows that the work

was necessary and beneficial, and that defendant by its possession, accepted and appropriated this work performed by the plaintiff to its own use, and for that reason the defendant is liable on an implied promise to pay. The latest expression applicable to this question is that of the Supreme Court in the case of Great Lakes Dredge Co. v. Chicago, 353 Ill. 614, which is as follows:

"The city, by standing by and without objecting permitting this work to be done and accepting the benefits of that work, must be held to have ratified it. Ratification may be proved by circumstances or inferred from acquiescence after notice. (American Car Co. v. Industrial Com. 335 Ill. 322.) It was long ago said by this court: 'If one sees another doing work for him beneficial in its nature and by his agent overlooks the work as it progresses and does not interfere to forbid it, the work itself being necessary and useful, and appropriates the work to his own use, he might be liable on an implied promise to pay the value of the work.' (DeWolf v. City of Chicago, 26 Ill. 443; Maher v. City of Chicago 38 id. 266.) a municipality may be estopped to defend that its agents were without power to make a contract when the facts show that such municipality has accepted the benefits of that contract, where the contract is such as the municipality was empowered to make. (McGovern v. City of Chicago, 281 Ill. 264; People v. Spring Lake Drainage and Levee District, 253 id. 479.)"

City of Elgin v. Joslyn, 36 Ill. App. 301, confirmed by the Supreme Court in 136 Ill. 525.

The defendant questions the action of the court in directing the jury to return a verdict for the plaintiff in the sum of \$48,764.81. The facts were before the jury that the defendant admitted there was a balance due the plaintiff of \$13,312.39. As to the balance of \$35,452.42, the defendant being liable, the court in directing the jury to find for the plaintiff, as we view the record, did not err. The question in dispute is not one of fact, but largely one of law, and from what we have said in this opinion, the defendant was liable and there was but one thing to do, which the trial court did, direct a verdict and enter judgment for the sum of \$48,764.81. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

37535

127
FARNHAM-KUHN COMPANY, now known as
KUHN-SAIPE & COMPANY,

(Plaintiff) Appellee,

v.

OWEN R. TRAYNER and VIRGINIA TRAYNER,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 641²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon an appeal by the defendants from a judgment for \$3,532.94, entered on February 21, 1934, in favor of the plaintiff. The action was instituted in the Municipal Court of Chicago by the plaintiff, wherein the Company sought to recover from the defendants the value of services rendered as a real estate broker in negotiating a ninety-nine year lease between the defendants and the Bethlehem Engineering Corporation. The case was heard before the court, without a jury, and on January 16, 1934, a judgment was entered in favor of the plaintiff and against the defendants for \$2,667.20. Subsequently, on February 21, 1934, upon notice to the defendants, the court after overruling defendants' motion for a new trial, increased the amount of the judgment to the sum here on appeal.

The plaintiff was a real estate broker, who approached the defendants, the owners of the property located at 3504-06 South State Street, Chicago, and represented that the plaintiff could procure the F. W. Woolworth Company as a tenant for the premises for a period of ninety-nine years, upon the condition that the defendants expend \$30,000 in remodeling the building on the property. This the defendants could not do, and it was suggested by the plaintiff's representative that another tenant could be found who would take advantage of having the F. W. Woolworth Company as a sub-tenant. Negotiations followed, and as a result, on February 25, 1929, a written

LEWIS & CLARK COMPANY, now known as
LEWIS & CLARK COMPANY

(Plaintiff)

v.

JOHN A. LEWIS and VIRGINIA LEWIS

(Defendants)

FILED 1934

RECEIVED 1934

ST. LOUIS, MO.

2791.1.641

RE. LEWIS & CLARK COMPANY, now known as LEWIS & CLARK COMPANY

This cause is in this court upon an appeal by the defendant

from a judgment for \$2,827.30, entered on February 21, 1934,

in favor of the plaintiff. The action was instituted in the Municipal

Court of Chicago by the plaintiff, wherein the Company sought to

recover from the defendants the value of services rendered as a real

estate broker in negotiating a ninety-nine year lease between the

defendants and the Metropolitan Engineering Corporation. The case was

tried before the court, without a jury, and on January 18, 1934, a

judgment was entered in favor of the plaintiff and against the

defendants for \$2,827.30. Subsequently, on February 21, 1934, upon

notice to the defendants, the court after overruling defendants'

motion for a new trial, increased the amount of the judgment to the

sum here on appeal.

The plaintiff was a real estate broker, who approached

the defendants, the owners of the property located at 1504-08 North

State Street, Chicago, and represented that the plaintiff could procure

the F. W. Woolworth Company as a tenant for the premises for a period

of ninety-nine years, upon the condition that the defendants expend

\$30,000 in remodeling the building on the property. This the

defendants could not do, and it was suggested by the plaintiff's

representative that another tenant could be found who would take

advantage of having the F. W. Woolworth Company as a tenant.

Negotiations followed, and as a result, on February 22, 1934, a written

agreement was entered into with the defendants and one Gomberg, an employee of the plaintiff company, providing for a ninety-nine year lease from the defendants to the Bethlehem Engineering Corporation "now being organized." The Bethlehem Engineering Corporation was incorporated on March 4, 1929, and a lease for the premises was entered into and signed by the parties, the date of which appears as February 25, 1929, and is acknowledged by the parties before a notary public as signed and sealed on March 9, 1929.

The lease provides for the payment to the plaintiff as commission the sum of \$5,000, and by amendment this sum was to be paid by the Bethlehem Engineering Corporation by deducting from the monthly rental a sum equal to \$66.66 on the first day of March, 1929, and monthly thereafter, and on the 1st day of September, 1934, \$500 was to be paid, and the further sum of \$500 on the first day of March, 1935.

The tenant was in possession of the premises for a period of six or seven months, and during that period of time this tenant deducted from the monthly rental due under the lease the installments which were to be deducted and paid to the plaintiff, which amounted to \$400.

The defendants contend that the plaintiff's right to recover depends upon the written lease entered into between the defendants and the Bethlehem Engineering Corporation.

The plaintiff had a certain duty to perform when acting as the agent of the defendants, and as such agent its attitude should be for the best interest of its principal, and the plaintiff should be frank in the negotiations which proceed the execution of a lease by its principal and the defendants. The negotiations finally resulted in the execution of a preliminary agreement for a lease with the defendants to be executed by the Bethlehem Engineering Corporation,

agreement was entered into with the defendants and one Gomburg, an employee of the plaintiff company, providing for a ninety-nine year lease from the defendants to the Bethlehem Engineering Corporation "now being organized." The Bethlehem Engineering Corporation was incorporated on March 4, 1933, and a lease for the premises was entered into and signed by the parties, the date of which appears as February 25, 1933, and is acknowledged by the parties before a notary public as signed and sealed on March 8, 1933.

The lease provides for the payment to the plaintiff as consideration the sum of \$2,000, and by amendment this sum was to be paid by the Bethlehem Engineering Corporation by deducting from the monthly rental a sum equal to 10% of the first day of March, 1933, and monthly thereafter, and on the last day of September, 1933, \$500 was to be paid, and the further sum of \$500 on the first day of March, 1935.

The tenant was in possession of the premises for a period of six or seven months, and during that period of time this tenant deducted from the monthly rental due under the lease the installments which were to be deducted and paid to the plaintiff, which amounted to \$400.

The defendants contend that the plaintiff's right to recover depends upon the written lease entered into between the defendants and the Bethlehem Engineering Corporation.

The plaintiff had a certain duty to perform when acting as the agent of the defendants, and as such agent its attitude should be for the best interest of its principal, and the plaintiff should be free to the defendant when it was the occasion of a lease by its principal and the defendants. The negotiations finally

resulted in the execution of a preliminary agreement for a lease with the defendants to be executed by the Bethlehem Engineering Corporation.

not then in existence. The Company was finally organized under the laws of the State of Illinois. At the time the lease was executed its capital stock was fixed at \$1,000. Aside from the question of the date of the instrument and whether false representations were made, it is rather startling, in view of its capital stock, that this Engineering Corporation undertook to assume the liability provided for in the 99 year lease. This lease provided for a total payment of \$628,600. It is worthy of note that the real estate agent was to be paid a commission five times as large as the capital of the Bethlehem Engineering Corporation, the tenant produced by the plaintiff.

The evidence would indicate that the plaintiff did not, as the agent of the defendants, produce a tenant who was able to assume and perform the obligations of this lease, by reason of the fact that the lessee was in possession of the premises for only seven months and then abandoned the property. The answer of the plaintiff is that as it was not a party to the lease, and therefore not in privity with the parties, it is entitled to receive the amount sued for as commission.

This involves the question whether the plaintiff, not a party thereto, is bound by the provision of the lease that fixes the payment of the plaintiff's commission. The plaintiff prepared not only the preliminary agreement, but also the lease and the amendment thereto, which provides the plan for payment of the commission. The first draft provided that the defendants execute judgment notes, payable to the plaintiff at several different maturities. This the defendants declined to do, and finally the amendment providing for payment was prepared by the plaintiff, which is as follows:

"It is further understood and agreed that, instead of the provision made in Paragraph 10 of Article III of said

not then in existence. The Company was finally organized under the laws of the State of Illinois. At the time the lease was executed its capital stock was fixed at \$1,000. Aside from the question of the date of the instrument and whether false representations were made, it is rather startling, in view of its capital stock, that this Engineering Corporation undertook to assume the liability provided for in the 23 year lease. This lease provided for a total payment of \$25,000. It is worthy of note that the real estate agent was to be paid a commission five times as large as the capital of the Federal Engineering Corporation, the tenant produced by the plaintiff.

The evidence would indicate that the plaintiff did not, as the agent of the defendant, produce a tenant who was able to assume and perform the obligations of this lease, by reason of the fact that the lessee was in possession of the premises for only seven months and then abandoned the property. The answer of the plaintiff is that as it was not a party to the lease, and therefore not in privity with the parties, it is entitled to receive the amount of the lease.

This involves the question whether the plaintiff, not a party thereto, is bound by the provision of the lease that times the payment of the plaintiff's commission. The plaintiff prepared not only the preliminary agreement, but also the lease and the amendment thereto, which provided the plan for payment of the commission. The first draft provided that the defendant execute judgment notes payable to the plaintiff at several different maturities. This the defendant declined to do, and finally the amendment providing for payment was prepared by the plaintiff, which is as follows:

It is further understood and agreed that, instead of the provision made in Paragraph 10 of Article III of said

indenture of lease for the payment of certain commissions to Farnham-Kuhn Company, the parties hereto agree and the parties of the first part hereby authorize the party of the second part to deduct from the monthly rent to be paid by them to the parties of the first part a sum equal to the respective notes intended to be given as and for commissions and to turn the same over to Farnham-Kuhn for and on account of said commissions, the parties of the first part agreeing to accept from the party of the second part as rent for the said respective months the difference between the amount reserved in the said lease and the amount deducted for commissions as aforesaid."

and clearly indicates the manner in which the commission was to be paid.

The fact that the plaintiff did not join in the execution of the lease does not relieve it from the terms of the amendment prepared by its President, and defendants' approval of the several payments made to the plaintiff by the Engineering Company. The plaintiff, having accepted performance under the terms of the lease with knowledge that the commission in question was to be paid, will be bound by the terms, notwithstanding plaintiff did not join in the execution of the lease. Lindeman v. Wagner, et al, 67 Ill. App. 134. Thompson v. Dearborn, et al, 107 Ill. 87; Also where a person for a valuable consideration makes a promise to another for the benefit of a third person, such third person may maintain an action on such promise, even where there is no consideration moving from the third party. Olson, et al. v. Ostby, 178 Ill. App. 165; Clinton Co. v. Stiles, 197 Ill. App. 505. This rule applies where the agreement is entered into upon a consideration by one to pay the debts of the other. It is not necessary to name the creditor in the agreement, and the creditor may maintain an action to recover under the terms of such an agreement. Williamson-Stewart Paper Co. v. Seaman, 29 Ill. App. 68. This rule also applies to agreements to pay or to assume debts of others, and such agreements may be enforced by the person benefited.

In construing this provision, the court will try to place itself in the position of the parties at the time the agreement was made, in order to arrive at the intention of the parties at the time the provision for the payment of the commission was considered.

It appears that the defendants objected to this provision for the execution of judgment notes by the defendants, and as a result another provision was inserted, from which it is evident that the commission was to be paid from the rents received from the Engineering Corporation until the amount was satisfied, which company was empowered to make a payment each month as the rent matured.

We have considered all the objections raised, and are of the opinion that the court erred in finding for the plaintiff and in entering judgment for the amount appealed from. The judgment is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

In construing this provision, the court will try to place itself in the position of the parties at the time the agreement was made, in order to arrive at the intention of the parties at the time the provision for the payment of the commission was considered.

It appears that the defendant objected to this provision for the execution of judgment notes by the defendant, and as a result another provision was inserted, from which it is evident that the commission was to be paid from the notes received from the defendant corporation until the amount was satisfied, which

provision was inserted in this judgment note as the first condition. We have considered all the objections raised, and are of the opinion that the court erred in finding for the plaintiff and in entering judgment for the amount specified above. The judgment is reversed and the cause remanded.

REVEREND JUDGE, IN COURT.

37606

PICTORIAL PAPER PACKAGE CORPORATION,

Defendant in Error,

v.

NATIONAL MINERAL COMPANY,

Plaintiff in Error.

WRIT OF ERROR

TO MUNICIPAL COURT

OF CHICAGO.

279 I.A. 641³

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a writ of error issued at the request of the defendant to review the record in the Municipal Court of Chicago, wherein the court at the close of the evidence directed the jury to return a verdict for the plaintiff in the sum of \$525.15. Upon this verdict the court entered judgment. The action by the plaintiff against the defendant was for goods manufactured upon a contract between the plaintiff and the defendant, and delivery refused by the defendant, to the damage of the plaintiff.

The defendant filed an affidavit of merits under oath, and substantially denied that the goods were manufactured according to the agreement between the plaintiff and the defendant, and averred that the contract was cancelled by the defendant for the unused merchandise, by reason of failure of the plaintiff to manufacture and deliver the boxes according to the agreement between the parties, and that the defendant was damaged in the sum of \$1,000, for which the defendant is entitled to recover from the plaintiff.

Upon the issues thus formed, the plaintiff offered evidence established by witnesses, and introduced exhibits Nos. 1, 2, 3, 4, 5 and 6, and the defendant submitted its evidence.

The evidence is substantially that the plaintiff was engaged in the manufacture of paper cartons, boxes and containers; that a salesman of the plaintiff, at the request of the defendant, called in regard to the manufacture by the plaintiff for the defendant

NATIONAL TRADING COMPANY, INC.

Defendant in Error,

v.

NATIONAL TRADING COMPANY, INC.

Plaintiff in Error.

OF CHICAGO.

2991 A. 641

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

This is a writ of error issued at the request of the

defendant to review the record in the Municipal Court of Chicago,

wherein the court at the close of the evidence directed the jury to

return a verdict for the plaintiff in the sum of \$232.12. Upon

this verdict the court entered judgment. The action by the plaintiff

against the defendant was for goods manufactured upon a contract

between the plaintiff and the defendant, and delivery refused by

the defendant, to the damage of the plaintiff.

The defendant filed an affidavit of merits under oath,

and substantially denied that the goods were manufactured according

to the agreement between the plaintiff and the defendant, and averred

that the contract was cancelled by the defendant for the reason

merchandise, by reason of failure of the plaintiff to manufacture and

deliver the boxes according to the agreement between the parties, and

that the defendant was damaged in the sum of \$1,000, for which the

defendant is entitled to recover from the plaintiff.

Upon the issues thus framed, the plaintiff offered evidence

established by witnesses, and introduced exhibits Nos. 1, 2, 3, 4,

5 and 6, and the defendant submitted its evidence.

The evidence is substantially that the plaintiff was

engaged in the manufacture of paper cartons, boxes and containers;

that a salesman of the plaintiff, at the request of the defendant,

called in regard to the manufacture by the plaintiff for the defendant

of a paper display box, in which to display face powder, face cream and other cosmetics. Samples were submitted by the plaintiff to the defendant, and finally resulted in an agreement between them for the manufacture of the paper display box. The defendant mailed to the plaintiff a signed order. All of the boxes were manufactured by the plaintiff, and one-half of the boxes were delivered to and received by the defendant. The balance of the order, the defendant refused to accept, on the ground that the boxes were not suitable for the purpose intended; that the plaintiff by its agent, in the manufacture of the boxes, warranted that they would be suitable for the shipment of goods by parcel post, express, or as freight to be carried by public carriers; that goods were shipped in the cartons and were damaged when received at the places designated.

The defendant's theory of defense is that the contract in question was not a complete and final statement of the transaction, and that parol evidence was competent to establish the agreement entered into between the parties. It is unfortunate that the defendant did not abstract the record, so that this court could have before it not only the evidence introduced and offered at the trial, but also the exhibits.

As a part of the evidence the plaintiff offered a number of exhibits, already referred to, some of which are relied upon by the plaintiff to establish a written agreement between the litigants for the manufacture of the display boxes in question.

We have examined the abstract for the purpose of considering the exhibits, together with the evidence, for the purpose of determining whether a written contract was entered into, but unfortunately the exhibits, which are important in the consideration of this question, were not abstracted. The fault with the abstract is that this court is unable from the abstract itself to determine the

of a paper display box, in which to display face powder, face cream and other cosmetics. Samples were submitted by the plaintiff to the defendant, and finally resulted in an agreement between them for the manufacture of the paper display box. The defendant mailed to the plaintiff a signed order. All of the boxes were manufactured by the plaintiff, and one-half of the boxes were delivered to and received by the defendant. The balance of the order, the defendant refused to accept, on the ground that the boxes were not suitable for the purpose intended; that the plaintiff by its agent, in the manufacture of the boxes, warranted that they would be suitable for the shipment of goods by parcel post, express, or as freight to be carried by public carriers; that goods were shipped in the cartons and were damaged when received at the places designated.

The defendant's theory of defense is that the contract in question was not a complete and final statement of the transaction, and that parcel evidence was competent to establish the agreement entered into between the parties. It is unfortunate that the defendant did not abstract the record, so that this court could have before it not only the evidence introduced and offered at the trial, but also the exhibits.

As a part of the evidence the plaintiff offered a number of exhibits, already referred to, some of which are relied upon by the plaintiff to establish a written agreement between the parties for the manufacture of the display boxes in question.

We have examined the abstract for the purpose of considering the exhibits, together with the evidence, for the purpose of determining whether a written contract was entered into, and whether the exhibits, which are important in the consideration of this question, were not controverted. The issue with the plaintiff is that this court is unable from the abstract itself to determine the

character of the contract, as to whether as a contract it was complete in itself, and whether the trial court was justified in refusing to receive parol evidence, the effect of which would tend to contradict the contract entered into between the parties.

The defendant does not seriously contend that the abstract is complete so that the court could properly pass upon the question involved, but suggests that if the plaintiff had relied only upon a written order of the defendant, which is an exhibit in the case, a different situation would apply, and that the trial court would have been justified in its ruling, but the unfortunate feature of this case is that even that exhibit is not abstracted. The defendant seems to have determined what was proper to be considered by this court when it prepared the abstract of record. This court should have before it the facts fairly abstracted so that the court could determine from the record the question whether the court erred in refusing to admit evidence offered by the defendant as to what the contract really was. This court, as well as the Supreme Court of this State, has considered the effect of the failure to file a proper abstract, and the expression of the court in its opinion upon this question in the case of Salisbury v. Deutsch, 178 Ill. App. 633 is as follows:

" * * *; nor are any of the several written instruments introduced in evidence abstracted. We fail to appreciate the opportunity of doing the work devolving upon counsel, and are not disposed to search the record for the information that the plaintiff should have furnished in the abstract. In Thornton v. Muus, 120 Ill. App. 422, the court cites many authorities in support of the rule there announced to the effect that where an appellant furnishes an incomplete abstract, in violation of the rule, it is not the duty of the court to search the record for reversible error. There are many other authorities to the same effect, and from what appears of the case at bar in the abstract, we have no inclination to hesitate in the enforcement of the rule."

It is also the rule that where a fair effort is made to comply with the rule that the abstract shall fully present the error relied upon sufficient for the purpose intended, although defective

character of the contract, as to whether or not it was complete in itself, and whether the trial court was justified in refusing to receive parol evidence, the effect of which would tend to contradict the contract entered into between the parties. The defendant does not seriously contend that the abstract is complete so that the court could properly pass upon the question involved, but suggests that if the plaintiff had relied only upon a written order of the defendant, which is an exhibit in the case, a different situation would apply, and that the trial court would have been justified in its ruling, but the unfortunate feature of this case is that even that exhibit is not abstracted. The defendant seems to have determined that it was proper to be satisfied by the abstract it prepared the abstract of record. This court should have before it the facts fairly abstracted so that the court could determine from the record the question whether the court acted in refusing to admit evidence offered by the defendant as to what the contract really was. This court, as well as the Supreme Court of this State, has considered the effect of the failure to file a proper abstract, and the expression of the court in its opinion upon this question in the case of California v. Wentz, 178 Cal. App. 2d 102 is as follows:

" * * * nor are any of the several written instruments introduced in evidence considered. It is to be noted that the abstract of the record is not a part of the record, and that the abstract is not a part of the record. In California v. Wentz, 178 Cal. App. 2d 102, the court after many authorities in support of the view that an abstract is not a part of the record, it is in an insoluble position, in violation of the rule, it is in the duty of the court to search the record for relevant facts. There are many other authorities to the same effect, and it is not apparent of the case at bar in the abstract, we have no indication to decide in the abstract of the rule."

It is also the rule that where a fair effort is made to comply with the rule that the abstract shall fairly present the facts relied upon sufficient for the purpose intended, although defective

in some particulars, the abstract is accepted as sufficient for the purposes intended, and if for any reason opposing counsel is not satisfied, he may file an additional abstract of the record. The Supreme Court in the case of Hickox v. City of Springfield, 208 Ill. 28, clearly set forth the duty of the parties in filing an abstract of the record, and said:

"This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done. As we said in Gibler v. City of Mattoon, 167 Ill. 18, 'it is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome.'"

The defendant having failed to properly abstract the record, and this court not being in a position to determine whether the complaint of the defendant is justified, the court will be obliged to assume that the trial court had before it all of the evidence, and that its ruling, based upon the evidence was proper. The judgment accordingly will be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

in some particular, the abstract is accepted as sufficient for the purposes intended, and it for any reason opposed counsel is not satisfied, he may file an additional abstract of the record. The Supreme Court in the case of Hickox v. City of Cincinnati, 208 Ill. 28, clearly set forth the duty of the parties in filing an abstract

of the record, and said:

"This right of the opposing counsel, however, has never been considered as limited by the filing of an abstract which does not attempt to comply with the law, and therefore counsel who do not attempt to comply with the law are not entitled to the same right as the party who does. It is not the duty of counsel to file an abstract which is not a true and correct copy of the record, but when counsel does so, it is the duty of the court to accept it as such, and to treat it as such."

The defendant having failed to properly abstract the

record, and this court not being in a position to determine whether the complaint of the defendant is justified, the court will be obliged to assume that the trial court had before it all of the evidence,

and that the trial court, based upon the evidence so presented, its judgment accordingly will be affirmed.

JUDGMENT AFFIRMED.

WITNESSED AND SIGNED, 14, 1908.

37616

JEAN S. GEARY, as Assignee,

Plaintiff-Appellee,

v.

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, a Corporation,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

279 I.A. 6414

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE
COURT.

Plaintiff's action in the Municipal Court of Chicago
against the defendant was on an alleged contract. After a hearing,
without a jury, the court entered judgment for the plaintiff and
against the defendant for \$1,440, from which the defendant prosecutes
this appeal.

Plaintiff's amended statement of claim alleges that the
defendant, on March 7, 1931, entered into an agreement with the
Foreman-State Trust and Savings Bank as receiver, whereby the defend-
ant agreed to enter into a lease for certain premises located at
3309 West Madison Street, Chicago, Illinois, for a period of one
year, commencing May 1, 1931, and ending April 30, 1932, at a monthly
rental of \$125; that the defendant refused to execute a lease, to
the damage of the Foreman-State Trust and Savings Bank in the sum of
\$1,500; that thereafter the plaintiff by assignment became the
owner of the claim of the Foreman-State Trust and Savings Bank
against the defendant.

The defendant filed its affidavit of merits, denying any
contract was entered into by and between the defendant and the
plaintiff's assignor for the execution of a lease for the premises.

The facts were stipulated, in substance, as follows:

WILLIAM S. GARY, as assignee,

Plaintiff-appellee,

v.

THE FIRST NATIONAL BANK OF CHICAGO, INC.,
Defendant-appellee.

CHICAGO, ILLINOIS.

MR. JUSTICE BRADLEY delivered the opinion of the court.

COURT.

Plaintiff's action in the Municipal Court of Chicago

against the defendant was on an alleged contract. After a hearing

without a jury, the court entered judgment for the plaintiff and

against the defendant for \$1,442.75 with interest thereon from

the date of the judgment.

Plaintiff's amended statement of claim alleges that the

defendant, on March 7, 1931, entered into an agreement with the

Foreman-State Trust and Savings Bank as receiver, whereby the bank

agreed to enter into a lease for certain premises located at

3808 West Madison Street, Chicago, Illinois, for a period of one

year, commencing May 1, 1931, and ending April 30, 1932, at a monthly

rent of \$125; that the defendant refused to execute a lease, to

the damage of the Foreman-State Trust and Savings Bank in the sum of

\$1,442.75; that thereafter the plaintiff by assignment bore the

loss of the claim of the Foreman-State Trust and Savings Bank

against the defendant.

The defendant filed its affidavit of denial, denying any

contract was entered into by and between the defendant and the

plaintiff's assignee for the execution of a lease for the premises.

The facts were stipulated, in substance, as follows:

"That the Foreman State Trust & Savings Bank, as Receiver, assigned its claim against the defendant to the Plaintiff on January 27th, 1933, by an instrument in writing and that Joseph B. Ford, as successor-receiver, assigned his claim against the defendant, to the plaintiff on January 14th, 1933, by an instrument in writing, pursuant to the terms of an order entered in the Superior Court of Cook County, Illinois.

That the defendant occupied a store located at 3309 W. Madison Street as a tenant of the Foreman State Trust & Savings Bank, as Receiver from the 1st day of May, 1930, to and including April 30th, 1931.

That on February 25th, 1931, the defendant wrote the Foreman State Trust & Savings Bank, enclosing unsigned original and duplicate copies of a renewal lease for said premises for one (1) year commencing May 1, 1931, at a monthly rental of \$125.00, and requested the said Foreman State Trust & Savings Bank to have both copies properly signed and returned to the defendant at its earliest convenience.

That on March 2, 1931, the Foreman State Trust & Savings Bank forwarded the leases to its attorney, Harry Perel, and requested him to procure the necessary court authority to execute the same.

That on March 6, 1931, the Foreman State Trust & Savings Bank, as receiver, was authorized to execute said leases by an order entered in the Superior Court of Cook County in a certain cause then pending.

That on March 7, 1931, at the hour of 10:30 A. M., the Foreman State Trust & Savings Bank, having executed the said leases, placed the same properly stamped, in the U. S. Mail, addressed to the defendant, and;

That on March 7, 1931, at the hour of 1:30 P. M. the defendant deposited in the U. S. Mail, a letter addressed to the Foreman State Trust & Savings Bank, as Receiver, withdrawing its offer to accept said lease and notifying the plaintiff that it did not intend to renew its lease after the expiration of the then present term on April 30, 1931, which letter was received by the Foreman State Trust & Savings Bank as Receiver on March 9, 1931; that this letter was written to the Foreman State Trust & Savings Bank by the defendant without its having any notice of the entry of the court order or the execution of the lease by the Foreman State Trust & Savings Bank and the deposit of the same in the mails to the defendant.

That the defendant on April 30, 1931, addressed a letter to the plaintiff enclosing keys for said premises and advising that it had vacated the same."

This stipulation between the parties was in lieu of evidence to be offered by either of the parties appearing in the above

"That the Foreman State Trust & Savings Bank, as Receiver, assigned its claim against the defendant to the Plaintiff on January 27th, 1931, by an instrument in writing and that Joseph M. Ford, as assignee, in receiver, assigned his claim against the defendant to the Plaintiff on January 27th, 1931, by an instrument in writing, pursuant to the terms of an order entered in the Superior Court of Cook County, Illinois.

That the defendant executed a note located at 1234 N. Madison Street as a tenant of the Foreman State Trust & Savings Bank, as Receiver from the 1st day of May, 1930, to and including April 30th, 1931.

That on February 25th, 1931, the defendant wrote the Foreman State Trust & Savings Bank, Cook County, Illinois, and requested copies of a renewal lease for said premises for one (1) year commencing May 1, 1931, and a copy of the lease for the year 1930-1931, and requested that the same be sent to the defendant at its proper address.

That on March 2, 1931, the Foreman State Trust & Savings Bank telephoned the defendant to its attorney, Harry Ford, and requested him to prepare the necessary court authority to renew the lease.

That on March 6, 1931, the Foreman State Trust & Savings Bank, as Receiver, was authorized to execute said lease by an order entered in the Superior Court of Cook County in a certain cause then pending.

That on March 7, 1931, at the hour of 10:30 A. M., the Foreman State Trust & Savings Bank, having executed the lease, placed the same properly stamped, in the U. S. Mail, addressed to the defendant, and;

That on March 7, 1931, at the hour of 1:30 P. M. the defendant received in the U. S. Mail, a letter addressed to the Foreman State Trust & Savings Bank, as Receiver, in which the letter stated that the lease was not renewed and that the expiration of the then present term on April 30, 1931, which letter was received by the Foreman State Trust & Savings Bank on March 8, 1931; that this letter was mailed in the Foreman State Trust & Savings Bank by the defendant without his having any notice of the entry of the court order or the execution of the lease by the Foreman State Trust & Savings Bank and the receipt of the same in the mail to the defendant.

That the defendant on April 30, 1931, addressed a letter to the Foreman State Trust & Savings Bank and requested that it be renewed the same."

This witness further states that the parties are in line of evidence in

cause, except as to any evidence to be produced by either side on the question of damages.

It appears from the pleadings that this action by the plaintiff is to recover damages arising out of the failure of the defendant to execute a lease, and is clearly stated by the plaintiff in his amended statement of claim and supported by his affidavit of merits. The rule applicable to the question of the recovery of rent upon a lease as a proper measure of damages does not apply where, as in the instant case, the pleading is based upon an action to recover damages for failure to execute a lease. As we have already indicated, the plaintiff must recover upon his pleading for whatever loss he sustained at the time of the breach. There is no question that failure of either party to sign a formal contract will not defeat recovery upon an agreement reached through correspondence, where the terms of the contract have been in all respects agreed upon. This rule does not apply to the facts in the instant case. The plaintiff's pleading filed in this action is not based upon a lease, as contended for, but is based solely and founded upon an action to recover damages for failure to execute a lease.

This court is controlled by the plaintiff's pleadings, and in this case there is lack of evidence to support plaintiff's statement of claim upon the subject of damages. No agreement having been formally executed, and the evidence being silent upon the damages, if any, sustained by the plaintiff at the time of the breach when the defendant failed to execute the lease, the court was not justified in entering the judgment for the amount of the rent due under a purported lease, and for that reason the judgment was erroneously entered by the court. The judgment accordingly will be reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

cause, except as to any evidence to be produced by either side on the question of damages.

It appears from the pleadings that this action by the plaintiff is to recover damages arising out of the failure of the defendant to execute a lease, and is clearly stated by the plaintiff in his amended statement of claim and supported by his affidavit of merit. The rule applicable to the question of the recovery of rent upon a lease as a proper measure of damages does not apply where, as in the instant case, the pleading is based upon an action to recover damages for failure to execute a lease. As we have already indicated, the plaintiff must recover upon his pleading for whatever loss he sustained at the time of the breach. There is no question that failure of either party to sign a formal contract will not defeat recovery upon an agreement reached through correspondence, where the terms of the contract have been in all respects agreed upon. This rule does not apply to the facts in the instant case. The plaintiff's pleading filed in this action is not based upon a lease, as contended for, but is based solely and founded upon an action to recover damages for failure to execute a lease. This court is controlled by the plaintiff's pleading, and in this case there is lack of evidence to support plaintiff's statement of claim upon the subject of damages. No agreement having been formally executed, and the witness being ALONE upon the subject, if any, sustained by the plaintiff at the time of the breach when the defendant failed to execute the lease, the court was not justified in entering the judgment for the amount at the rate and under a portioned lease, and for that reason the judgment was erroneously reversed by the court. The judgment accordingly will be reversed and the

37623

WRIGHT & COMPANY, a corporation,

Plaintiff - Appellee,

v.

RAYMOND F. MOORE and HARRY BAIRSTOW,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 642¹

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment in the sum of \$400, entered in the Municipal Court of Chicago in favor of the plaintiff in a non-jury action upon evidence heard before the trial court.

The plaintiff's statement of claim is for the recovery of \$410.59, on an account for goods, wares and merchandise sold and delivered by the plaintiff to the defendants. The defendants filed an affidavit of merits in which they denied that they were indebted to the plaintiff, or that they bought or received from the plaintiff any goods, wares and merchandise on an account stated.

Plaintiff is engaged in the coal business. One Emil Ehrenberg was the owner of a building known as the Clifton Avenue Building, and was a former customer of the plaintiff. This owner wished to buy coal and spoke to Kenneth Johnson, who was in charge of plaintiff's coal yard, about the purchase of coal for the Clifton Avenue Building on credit. He was refused credit unless Ehrenberg, the owner, could get someone to guarantee payment. Ehrenberg then told Johnson that he Ehrenberg had made a deal in connection with the building, and if Johnson would telephone Raymond Moore at the office of Harry Bairstow, Moore would tell Johnson about the deal. Johnson telephoned Moore and asked him to O. K. Ehrenberg's account, and Johnson testified that Moore said, "I have the authority to authorize you to charge the coal to Harry Bairstow." This statement is denied by Moore. The fact that Johnson had a telephone conversation

APPEAL FROM
MUNICIPAL COURT

OF CHICAGO.

37623

WRIGHT & COMPANY, a corporation,
Plaintiff - Appellee,
v.
RAYMOND E. MOORE and HARRY BAINSTON,
Defendants - Appellants.

MR. PRESIDING JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.
The defendants appeal from a judgment in the sum of \$400,
entered in the Municipal Court of Chicago in favor of the plaintiff
in a non-jury action upon evidence heard before the trial court.
The plaintiff's statement of claim is for the recovery of
\$410.00, on an account for goods, wares and merchandise sold and
delivered by the plaintiff to the defendants. The defendants filed
an affidavit of merits in which they denied that they were indebted
to the plaintiff, or that they bought or received from the plaintiff
any goods, wares and merchandise on an account stated.
Plaintiff is engaged in the coal business. One Emil
Kirschberg was the owner of a building known as the Clifton Avenue
Building, and was a former customer of the plaintiff. This owner
wished to buy coal and spoke to Kenneth Johnson, who was in charge
of plaintiff's coal yard, about the purchase of coal for the Clifton
Avenue Building on credit. He was refused credit unless Kirschberg
the owner, could get someone to guarantee payment. Kirschberg told
Johnson that he Kirschberg had made a deal in connection with
the building, and if Johnson would telephone Raymond Moore of the
office of Harry Bainton, Moore would tell Johnson about the deal.
Johnson telephoned Moore and asked him to O. K. Kirschberg's account,
and Johnson testified that Moore said, "I have the authority to
authorize you to charge the coal to Harry Bainton." This statement
is denied by Moore. The fact that Johnson had a telephone conversation

was admitted by him. There is also evidence by one Hubbell, treasurer of the plaintiff corporation, that he talked with Moore, which conversation was had at Bairstow's office, and that Moore then made the statement that he had authority from Bairstow to have the coal delivered to the Clifton Avenue Building charged to Bairstow.

In the defense of this action, the defendant Bairstow as a witness, denied that he authorized Moore or any one else to buy coal from the plaintiff, or to charge the coal to this witness's account.

The monthly bills issued by the plaintiff for coal delivered were charged to the defendant Bairstow, but were not called to his attention until he had had a conversation with Johnson of the plaintiff company.

The important question is; Did Bairstow authorize the defendant Moore to act for him in regard to the coal deals, the subject of this litigation, and did Bairstow by his acts, acknowledge that Moore acted for him, and thereby become liable for the coal account?

There are several significant facts which indicate that Bairstow had knowledge that Ehrenberg was in financial distress in regard to the Clifton Avenue Building, and that he, Bairstow, advised Ehrenberg to see Moore; that he, Moore, could probably help him with the holders of the first mortgage, who were demanding payment of matured notes. Then, again, Moore had entree to Bairstow's office, received the coal bills charged to Bairstow and checked the bills. This is not all. When Bairstow's attention was called to the balance due, he wanted the plaintiff to take half cash, the balance of the account to be paid by this defendant from the receipts of the building. The fact is not denied that the coal

and admitted to him. There is also evidence by one Campbell, treasurer of the plaintiff corporation, that he talked with Moore, which conversation was had at Bairstow's office, and that Moore then made the statement that he had authority from Bairstow to have the coal delivered to the Clifton Avenue Building charged to Bairstow.

In the defense of this action, the defendant Bairstow as a witness, denied that he authorized Moore or any one else to buy coal from the plaintiff, or to charge the coal to this witness's account.

The monthly bills issued by the plaintiff for coal delivered were charged to the defendant Bairstow, but were not called to his attention until he had had a conversation with Johnson of the plaintiff company.

The important question is: Did Bairstow authorize the defendant Moore to act for him in regard to the coal deals, the subject of this litigation, and did Bairstow by his acts, acknowledge that Moore acted for him, and thereby become liable for the coal accounts?

There are several significant facts which indicate that Bairstow had knowledge that Threnberg was in financial distress in regard to the Clifton Avenue Building, and that he, Bairstow, advised Threnberg to see Moore; that he, Moore, could probably help him with the balance of the first mortgage, and was desirous of securing a second mortgage. Then, again, Moore had access to Bairstow's office, received the coal bills charged to Bairstow and checked the bills. This is not all. When Bairstow's attention was called to the balance due, he wanted the plaintiff to cash his check, the balance of the account to be paid by this defendant from the receipts of the building. The fact is not denied that Bairstow

was received and used in the Clifton Avenue Building, nor is the balance due for the coal delivered in dispute.

Defendant Bairstow questioned the ruling of the trial court in the admission of certain statements made by Moore, on the ground that the agency was not established by competent evidence binding upon the defendant Bairstow. The facts are in some respects disputed, but many of them, while not admitted by the defendants are not denied, and from the facts as they appear in the record they establish the agency of Moore. The facts and circumstances were such that the trial court, in considering the weight of the evidence, concluded they were sufficient to charge Bairstow with the acts of Moore. It is not for this court to question the ruling of the trial court unless the evidence manifestly indicates that the trial court erred in entering judgment, and the presumption is that the trial court in reaching its conclusion only considered competent evidence, and in doing so found that Moore was empowered to act by defendant Bairstow, and that Moore misled the plaintiff in extending this credit. The knowledge that Bairstow must have had, not only from the receipt of plaintiff's bills mailed to his office, but also from his admission of liability by offering to pay half cash and the balance of the account from the receipts of the building, would indicate that he approved of the conduct of Moore, and that Moore had authority when he told the plaintiff to charge the coal account to Bairstow.

One of the objections made by defendant Bairstow is, that the evidence that Bairstow offered the plaintiff half cash and the balance of the account from the receipts of the building, was in effect an offer of settlement, and not competent. This rule, however, does not apply, for the reason that the offer was not made as an offer of settlement, but was, in effect, an adjustment of the account by extending the time of payment for at least one half of

was received and used in the Ulster Avenue Building, nor is the

balance due for the coal delivered in dispute.

Defendant Hainston questioned the ruling of the trial

court in the admission of certain statements made by Moore, on the

ground that the agency was not established by competent evidence

binding upon the defendant Hainston. The facts are in some respects

disputed, but many of them, while not admitted by the defendants are

not denied, and from the facts as they appear in the record they

establish the agency of Moore. The facts and circumstances were

such that the trial court, in considering the weight of the evidence,

concluded they were sufficient to charge Hainston with the acts of

Moore. It is not for this court to question the ruling of the trial

court unless the evidence manifestly indicates that the trial court

erred in entering judgment, and the presumption is that the trial

court in reaching its conclusion only considered competent evidence,

and in doing so found that Moore was empowered to act by defendant

Hainston, and that Moore misled the plaintiff in extending this

credit. The knowledge that Hainston must have had, not only from

the receipt of plaintiff's bills mailed to his office, but also

from his admission of liability by offering to pay half cash and

the balance of the account from the receipts of the building, would

indicate that he approved of the conduct of Moore, and that Moore

was authorized when he told the plaintiff to charge the coal account

to Hainston.

One of the objections made by defendant Hainston is, that

the evidence that Hainston offered the plaintiff half cash and the

balance of the account from the receipts of the building, was in

effect an offer of settlement, and not competent. This rule, however,

does not apply, for the reason that the offer was not made as an

offer of settlement, but was, in effect, an admission of the

account by admitting the time of payment for at least one half of

the account until the receipts from the building were sufficient to pay the balance.

There is no doubt that in the entry of judgment for the plaintiff and against the two defendants, the court erred. The record is barren of any facts that would establish liability of the defendant Moore. The fact that he acted for Bairstow did not make him jointly liable. The rule is well settled, and needs no citation of authority, that where one acts for a principal, as was done in this case, the liability is that of the principal.

Under the former procedure governing actions of this character this court would be required to reverse and remand this cause, but under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered. This power to enter such judgment is provided for in Para. 220, Sec. 92, Chap. 110, of the Practice Act, Cahill's Ill. Rev. St. 1963, Sub-division (f), which is in these words:

"Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require."

So that from the conclusions reached by this court, the judgment for the plaintiff against the defendant Bairstow is affirmed, and reversed as to defendant Moore.

JUDGMENT AFFIRMED IN PART AND
REVERSED IN PART.

WILSON AND HALL, JJ. CONCUR.

*Certs to be taped in this court
against Henry Bairstow, one of the
defendants.*

the account until the receipts from the building were sufficient to pay the balance.

There is no doubt that in the entry of judgment for the plaintiff and against the two defendants, the court erred. The court is barren of any facts that would establish liability of the defendant Moore. The fact that he acted for Bristow did not make him jointly liable. The rule is well settled, and needs no citation of authority, that where one acts for a principal, as was done in this case, the liability is that of the principal.

Under the former procedure governing actions of this character this court would be required to reverse and remand this cause, but under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered. This court is authorized to enter such judgment as the trial court should have entered. Under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered. Under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered.

It is the duty of the court to enter such judgment as the trial court should have entered. Under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered. Under the Civil Practice Act, the court is now empowered to enter such judgment as the trial court should have entered.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

WILLIAM L. HILL, JR. CLERK

[Handwritten signature and notes at the bottom of the page]

37646

JOSEPH WENCAPAL,

(Plaintiff) Appellant,

v.

SALOMI WENCAPAL,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

279 I.A. 642²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order vacating and setting aside that part of a decree in a divorce proceeding, wherein an amount was found to be due of \$6,000 from the defendant to the complainant, as set forth in that part of the decree. The decree was entered by the Chancellor on October 20, 1933. The order modifying the decree was entered on December 22, 1933.

Contention is made by the complainant that the court in modifying the decree on December 22, 1933, was without jurisdiction after the term to enter the order. This court is without the benefit of defendant's theory which would justify the entry of the order here on appeal, for want of her appearance.

The action being one in chancery, it is a grave question as to whether the procedure adopted and followed by the Chancellor was a proper one. The rule is that in chancery, even after term time, the procedure is, for the party complaining to present facts by a bill of review or a bill in the nature of a bill of review, to the chancellor for relief, or by appeal or writ of error to review the record, not upon a motion to vacate, as was done in this case. The Supreme Court in the case of Tosetti Brewing Co. v. Koehler, 200 Ill. 369, a somewhat analogous case, said:

"The decree was under the control of the court during the May term, at which it was entered, and might have been set aside or vacated during the term, or subsequently, upon motion made during the term, and continued to a subsequent term; but nothing of that kind was done.

JOHN HENRY

(Plaintiff) Defendant

v.

ALTON HENRY

(Defendant) Plaintiff

SUPERIOR COURT

COOK COUNTY

27648 I.A. 648

MR. PRESIDING JUSTICE HEARD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order vesting and setting aside that part of a decree in a divorce proceeding wherein an amount was found to be due of \$5,000 from the defendant to the complainant, as set forth in that part of the decree. The decree was entered by the Chancellor on October 20, 1933. The order modifying the decree was entered on December 22, 1933.

Contention is made by the complainant that the court in modifying the decree on December 22, 1933, was without jurisdiction after the term to enter the order. This court is without the benefit of defendant's theory which would justify the entry of the order after the term, for want of due diligence.

The action being one in chancery, it is a grave question as to whether the procedure adopted and followed by the Chancellor was a proper one. The rule is that in chancery, even after term time, the procedure is, for the party complaining to present facts by a bill of review or a bill in the nature of a bill of review, to the Chancellor for relief, or by appeal or writ of error to review the record, not upon a motion to vacate, as was done in this case.

The Supreme Court in the case of Tossett Printing Co. v. Kessler, 200 Ill. 111, 1933, a somewhat analogous case, said:

"The decree was under the control of the court during the term, at which it was rendered, and might have been set aside or revised during the term, or subsequently, upon motion made during the term, and continued to a subsequent term; but nothing of that kind was done."

After a term has elapsed a decree may be corrected, on motion, in matters of form or mere clerical errors or misprisions of the clerk, but the court is then without power to change the decision, or to set aside, vacate, modify or annul a decree. No error of law of any kind will justify revising or annulling a decree at a subsequent term in a summary way on a motion, but relief against it must be obtained by appeal or writ of error if the error is apparent on the face of the record, and if not, by bill of review or bill to impeach the decree for fraud. *** A decree regularly entered cannot be altered or amended after the term has elapsed, except for the correction of matters of form or clerical errors. *** These rules have been settled by repeated decisions of this court."

See also Wolff v. Schwill & Co., 351 Ill. 28; Totten v. Totten, 299 Ill. 43; Bushnell v. Cooper, 289 Ill. 260.

The record is not altogether clear upon what ground the court assumed jurisdiction to enter the vacating order, and from the authorities to which we have referred, the Chancellor erred in the entry of the order. Accordingly, the order will be reversed.

ORDER REVERSED.

WILSON AND HALL, JJ. CONCUR.

After a term has elapsed a decree may be corrected, on motion, in cases of clerical errors or misstatements of fact, but the court is not authorized to change the decision, or to set aside, vacate, modify or annul a decree. No error of law of any kind will justify revoking or annulling a decree of a court. A decree may be corrected in a summary way on a motion, but relief against it must be obtained by appeal or writ of error if the error is apparent on the face of the record, and if not, by bill of review or bill to impeach the decree. A decree regularly entered cannot be altered or amended after the term has elapsed, except for the correction of matters of form or clerical errors. These rules have been settled by repeated decisions of this court.

See also Will v. Will, 100 Ill. 400; Will v. Will, 100 Ill. 400; Will v. Will, 100 Ill. 400; Will v. Will, 100 Ill. 400.

The record is not altogether clear upon what ground the court assumed jurisdiction to enter the vacating order, and from the authorities to which we have referred, the Chancellor erred in the entry of the order. Accordingly, the order will be reversed.

WILSON AND HALL, JJ. CONCUR.

37709

GLEATIS, doing business as CENTRAL
BILLIARDS, SPORTING GOODS AND
NOVELTIES,

Appellees,

v.

THE CENTURY INSURANCE COMPANY LIMITED,
OF EDINBURGH, SCOTLAND, a Corporation,

Appellant.

132
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

} 279 I.A. 642³

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$900 against the defendant and for the plaintiff, which was entered in the Municipal Court of Chicago.

Plaintiff's action is one upon a fire insurance policy in the amount of \$1,000, issued by the defendant to the plaintiff. Subsequently, on February 8, 1933, a fire occurred which destroyed the contents of plaintiff's store located at 6237 Archer Avenue, Summit, Illinois.

The defense of the defendant is that the plaintiff was guilty of fraud, concealment and misrepresentation of material facts sworn to by the plaintiff. The evidence offered by the plaintiff is substantially based upon the policy of insurance in evidence. The plaintiff was engaged in a retail business, selling tobacco, cigarettes and cigars, and also carrying a line of sporting goods and novelties, and conducting a billiard and pool business at the place described in the insurance policy issued by the defendant.

On February 8, 1933, after the close of business, in the nighttime a fire occurred and destroyed the stock of merchandise valued at \$5,408.70, furniture and fixtures in the sum of \$8,098.65, and office supplies amounting to the sum of \$267, making a total loss claimed by the plaintiff of \$13,774.35.

Plaintiff was a witness, together with his brother Louis

240.1A.042
 CHICAGO, ILL.
 THE CENTURY TRADING COMPANY LIMITED
 100 WEST WASHINGTON STREET
 CHICAGO, ILL.
 DEFENDANT
 vs.
 JAMES J. BROWN
 PLAINTIFF
 100 WEST WASHINGTON STREET
 CHICAGO, ILL.

MR. PRESIDING JUSTICE HENRY D. BROWN OF THE COURT.
 This is an appeal from a judgment for \$200 against the
 defendant and for the plaintiff, which was entered in the Municipal
 Court of Chicago.
 Plaintiff's action is one upon a fire insurance policy
 in the amount of \$1,000, issued by the defendant to the plaintiff.
 Subsequently, on February 8, 1933, a fire occurred which destroyed
 the contents of plaintiff's store located at 8357 Archer Avenue,
 Chicago, Illinois.
 The defense of the defendant is that the plaintiff was
 guilty of fraud, concealment and misrepresentation of material facts
 sworn to by the plaintiff. The evidence offered by the plaintiff is
 substantially based upon the policy of insurance in evidence. The
 plaintiff was engaged in a retail business, selling tobacco, cigarettes
 and cigars, and also carrying a line of sporting goods and novelties,
 and conducting a billiard and pool business at the place described
 in the insurance policy issued by the defendant.
 On February 8, 1933, after the close of business, in the
 nighttime a fire occurred and destroyed the stock of merchandise
 valued at \$2,408.70, furniture and fixtures in the sum of \$2,996.65,
 and office supplies amounting to the sum of \$287, making a total loss
 claimed by the plaintiff of \$5,692.40.
 Plaintiff was a witness, together with his brother Louis

Gleatis, who acted as manager of the business, and each of them testified as to the value of the property destroyed on the premises at the time of the fire. The value of the furniture, fixtures, pool tables and equipment was testified to by a witness named Martin D. Johnson, who was a representative of Brunswick-Balke Collender Company, engaged in the manufacture of billiard and pool tables; by Harry H. Herbst, who acted as adjuster for the plaintiff; and also by Richard V. Riordan, who acted for the plaintiff, and as adjuster for other insurance companies interested in the fire loss.

The defendant in support of its defense offered D. Finkelstein, who testified as to the value of the pool and billiard tables and equipment, and there is also evidence by Fred A. Deuss, who appeared as adjuster for the defendant.

The evidence tends to show that an inventory was taken by the plaintiff about January 8, 1933, and in this work was assisted by his brother Louis Gleatis. This inventory was copied into the proof of loss, and described the property that was lost by the fire.

The evidence of the plaintiff, which tends to show the value of the items for which claim is made, was contradicted in some respects by the witnesses for the defendant. The trial court instructed orally, and thereafter the jury returned a verdict for the plaintiff, upon which the court entered judgment after overruling defendant's motion for a new trial.

The defendant contends that the plaintiff's case, as established on the trial, was fraudulent, the testimony being so absurd as to be unbelievable, even though such evidence was not contradicted.

It is evident from the record that the testimony regarding the loss and the amount was contested by the testimony given by defendant's witnesses. This fact of itself is not sufficient to

Electric, who acted as manager of the business, and each of them testified as to the value of the property destroyed on the premises at the time of the fire. The value of the furniture, fixtures, pool tables and equipment was testified to by a witness named Martin D. Johnson, who was a representative of Brunswick-Balke-Whitcomb Company, engaged in the manufacture of billiard and pool tables; by Harry M. Herbat, who acted as adjuster for the plaintiff; and also by Edward J. Hadden, who acted for the plaintiff, and as adjuster for other insurance companies interested in the fire loss. The defendant in support of its defense offered U. Liskowsky, who testified as to the value of the pool and billiard tables and equipment, and there is also evidence by Fred A. Jones, who appeared as adjuster for the defendant. The evidence tends to show that an inventory was taken by the plaintiff about January 8, 1935, and in this work was assisted by his brother Louis Electric. This inventory was copied into the proof of loss, and described the property that was lost by the fire. The affidavit of the plaintiff, which tends to show the value of the items for which claim is made, was contradicted in some respects by the witnesses for the defendant. The trial court instructed orally, and thereafter the jury returned a verdict for the plaintiff, upon which the court entered judgment after overruling defendant's motion for a new trial. The defendant contends that the plaintiff's case, as established on the trial, was fraudulent, the testimony being so absurd as to be unbelievable, even though such evidence was not contradicted. It is evident from the record that the testimony regarding the loss and the amount was contested by the testimony given by defendant's witnesses. This fact of itself is not sufficient to

justify this court in setting aside the judgment entered upon the verdict. The facts appearing in the record were heard by the trial court, and again in the consideration of defendant's motion for a new trial, which motion was overruled, and unless the evidence is manifestly against the conclusion reached by both the jury and the trial court, this court will not interfere.

The defendant stresses the point that immediately after the fire the defendant's adjuster was unable to find the kind of merchandise for which claim was made by the plaintiff. The fire occurred when the temperature was below zero, and as a consequence the merchandise was covered with ice, and whether or not the adjuster for the Company could properly make an inspection was one for the jury. The facts in this case were, of course, considered by the jury. It is significant that no question was raised that by the admission of evidence offered by the plaintiff over objection, or by the instructions given by the court to the jury, the defendant was deprived of a fair trial. We have the right to presume that the trial court did not believe that the evidence offered by the plaintiff was false. The charge made is a serious one, and where one is accused of false swearing, the evidence should clearly convince the court that such is the fact. Contradiction by witnesses is not of itself sufficient. The rule is that where fraud is charged it should be clearly established from the facts.

The defendant also stresses the failure of plaintiff to include the pool and billiard tables and cases in the inventory produced. Only one conclusion can be reached from that fact, and that is the inventory was a false one. While this fact was before the jury, it is not conclusive, for the reason that the pool and billiard tables and equipment were in the store at the time of the fire, which fact is not disputed by the defendant.

justify this court in setting aside the judgment entered upon the verdict. The facts appearing in the record were heard by the trial court, and again in the consideration of defendant's motion for a new trial, which motion was overruled, and unless the evidence is manifestly against the conclusion reached by both the jury and the trial court, this court will not interfere.

The defendant stresses the point that immediately after the fire the defendant's adjuster was unable to find the kind of merchandise for which claim was made by the plaintiff. The fire occurred when the temperature was below zero, and as a consequence the merchandise was covered with ice, and whether or not the adjuster for the company could properly make an inspection was one for the jury. The facts in this case were, of course, considered by the jury. It is significant that no question was raised that by the admission of evidence offered by the plaintiff over objection, or by the instructions given by the court to the jury, the defendant was deprived of a fair trial. We have the right to presume that the trial court did not believe that the evidence offered by the plaintiff was false. The charge made is a serious one, and there one is accused of false swearing, the evidence should clearly convince the court that such is the fact. Contradiction by witnesses is not of itself sufficient. The rule is that where fraud is charged it should be clearly established from the facts.

The defendant also stresses the failure of plaintiff to include the pool and billiard tables and cases in the inventory produced. Only one conclusion can be reached from that fact, and that is the inventory was a false one. While this fact was before the jury, it is not conclusive, for the reason that the pool and billiard tables and equipment were in the place at the time of the fire, which fact is not disputed by the defendant.

Another significant fact appearing in the case is that at the time the policy of insurance was issued by the defendant, no doubt the merchandise covered by the insurance was upon the premises of the plaintiff, or otherwise defendant would not have issued the policy to cover the insurance on the contents of the store of the plaintiff.

Upon an examination of the instructions given by the court to the jury, we find that the court upon the question of fraud stated the policy would be void if the plaintiff concealed or misrepresented in writing any material fact.

The jury was also told by the court that if from the greater weight of the evidence the damages were excessive, and false statements as to value were knowingly made, the plaintiff could not recover, and the jury's attention was directed to the fact that if there was any inherent improbability, in the statement of a witness, the jury could disregard such evidence, even in the absence of any contradictory evidence. The jury was carefully instructed, as is evidenced by the failure to note an objection by either of the parties, and we believe that the judgment entered by the court is sustained by the evidence in the record. The record being free of error the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

Another significant fact appearing in the case is that at the time the policy of insurance was issued by the defendant, no bonds, the merchandise covered by the insurance was upon the premises of the plaintiff, or otherwise defendant would not have issued the policy to cover the insurance on the contents of the above of the

plaintiff.

Upon an examination of the instructions given by the court to the jury, we find that the court upon the question of burden stated the policy would be void if the plaintiff concealed or misrepresented in writing any material fact.

The jury was also told by the court that if from the question of the evidence the insurer was negligent, and this state- ment as to value were knowingly made, the plaintiff could not recover and the jury's attention was directed to the fact that if there was not material misrepresentation, as the statement of a witness, the jury

could disregard such evidence, even in the absence of any contrary history evidence. The jury was carefully instructed, as is evidenced by the failure to note an objection by either of the parties, and we believe that the judgment entered by the court is sustained by the evidence in the record. The record being free of error the judgment is affirmed.

THE COURT AFFIRMED.

ALICE ANN SMITH, BY COUNSEL, PLAINTIFF,

VERSUS

THE DEFENDANT.

THE COURT AFFIRMED.

THE COURT AFFIRMED.

THE COURT AFFIRMED.

37257

IRVING I. COHEN and LENA SHERMAN,

Plaintiffs in Error,

v.

BARNEY B. LIBMAN,

Defendant in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

279 I.A. 642⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On April 14th, 1930, plaintiffs brought suit in the Circuit Court of Cook County against defendant in an action of trespass on the case. Summons was served on defendant on April 22nd, 1932, and on the same day, defendant, by his attorney Joseph A. Kolb, entered his appearance. Thereafter, on May 24th, 1932, defendant filed a plea of the general issue, and on June 17th, 1932, plaintiff filed a similiter to the plea. On October 26th, 1932, the cause was placed on the trial calendar of the Circuit Court and set for trial on January 31st, 1933. On January 6th, 1933, after notice had been served on all the parties, Joseph A. Kolb, the attorney for defendant, withdrew his appearance as defendant's attorney. On February 23rd, 1933, after the cause had been placed on the trial calendar, as before stated, it came on for trial. Defendant did not appear, and after an ex parte hearing, and after submitting the cause to a jury, the jury returned a verdict in favor of plaintiff, assessing plaintiff's damages at the sum of \$1,500.00, and on the same day, a judgment for that amount was entered against defendant.

On April 11th, 1933, defendant filed a petition in the Circuit Court, supported by his affidavit, in which he prayed that the judgment be vacated, and that a capias issued thereunder, be stayed. In this petition defendant recites in substance that after he had been served with summons in the cause, he employed one Joseph A. Kolb as his attorney, and that on April 22nd, 1932, Kolb filed his

1937

EXHIBIT 1. SUMMONS AND ANSWER

Plaintiff in Error

Defendant in Error

EXHIBIT 2. JURY

Plaintiff in Error

Defendant in Error

279 I.A. 642

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On April 14th, 1937, Plaintiff brought suit in the Circuit Court of Cook County against defendant in an action of trespass on the case. Summons was served on defendant on April 13th, 1937, and on the same day, defendant, by his attorney Joseph A. Kelp, entered his appearance. Thereafter, on May 24th, 1937, defendant filed a plea of the general issue, and on June 17th, 1937, Plaintiff filed a similar plea to the plea. On October 28th, 1937, the cause was placed on the trial calendar of the Circuit Court and set for trial on January 8th, 1937. On January 6th, 1937, after notice had been served on all the parties, Joseph A. Kelp, the attorney for defendant, withdrew his appearance as defendant's attorney. On January 22nd, 1937, after the cause had been placed on the trial calendar, as before stated, it came on for trial. Defendant did not appear, and after an ex parte hearing, and after submitting the cause to a jury, the jury returned a verdict in favor of Plaintiff, assessing Plaintiff's damages at the sum of \$1,500.00, and on the same day, a judgment for that amount was entered against defendant.

On April 11th, 1937, defendant filed a petition, in the Circuit Court, supported by his affidavit, in which he stated that the judgment be reversed, and that a venire issued thereunto, be stayed. In this petition defendant prayed an adjournment until after he had been served with summons in the cause, he employed one Joseph A. Kelp as his attorney, and that on April 22nd, 1937, Kelp filed his

appearance in the cause, together with a demand for jury trial, and that thereafter he, Kolb, filed the pleas hereinbefore referred to; that thereafter on July 22nd, 1932, after notice being served, the cause was placed on the trial calendar; that on September 27th, 1932, the cause was stricken from such trial calendar, and that thereafter on October 26th, 1932, on motion of plaintiff, the order of September 27th, 1932, striking the case from the trial calendar, was vacated and the cause was set for trial, that the affiant is informed that notice of the motion of the plaintiff to reinstate the cause on the trial calendar was delivered to a stranger in the office of his attorney Kolb, during Kolb's absence from his office; but that, to the best of his knowledge and belief, Kolb never received the notice; that there was no appearance for defendant at the time such order was entered, and that the petitioner had no notice of such setting; that Kolb withdrew his appearance as attorney for defendant, as already stated, and that defendant employed another attorney, who never entered defendant's appearance. There is no showing by Kolb, defendant's attorney, that he failed to receive the notice of the setting of the cause, and no statement in petitioner's affidavit to that effect, except the statement made on petitioner's information and belief that no such notice was received. On May 2nd, 1933, the court entered an order vacating the judgment against defendant, and it is from this order that the appeal herein is taken.

We are of the opinion that there was no sufficient showing made by defendant which justified the court in vacating and setting aside this judgment. It was in the third term after the entry of the judgment that the order was entered, and the court was without power to vacate the judgment on the showing made. Travelers Insurance Co. v. Wagner, 379 Ill. App. 13.

appearance in the cause, together with a demand for jury trial, and that thereafter he, Kolb, filed the plea heretofore referred to; that thereafter on July 2nd, 1932, after notice being served, the cause was placed on the trial calendar; that on September 27th, 1932, the cause was stricken from such trial calendar, and that thereafter on October 26th, 1932, on motion of plaintiff, the order of September 27th, 1932, striking the case from the trial calendar, was vacated and the cause was set for trial, that the plaintiff is informed that notice of the motion of the plaintiff to reinstate the cause on the trial calendar was delivered to a stranger in the office of his attorney Kolb, during Kolb's absence from his office; but that, to the best of his knowledge and belief, Kolb never received the notice; that there was no appearance for defendant at the time such order was entered, and that the petitioner had no notice of such setting; that Kolb withdrew his appearance as attorney for defendant, as already stated, and that defendant employed another attorney, who never entered defendant's appearance. There is no showing by Kolb, defendant's attorney, that he failed to receive the notice of the setting of the cause, and no statement in petitioner's affidavit to that effect, except the statement that on May 2nd, 1932, the court entered an order vacating the judgment against defendant, and it is from this order that the appeal herein is taken.

We are of the opinion that there was no sufficient showing made by defendant which justified the court in vacating and setting aside this judgment. It was in no wise taken after the entry of the judgment that the order was entered, and the court was without power to vacate the judgment on the showing made. Exhibit A and Exhibit B.

V. Warner, 270 Ill. App. 12.

Defendant had entered his appearance in the case by his attorney, and it is recited in the affidavit filed by plaintiff in answer to defendant's petition, that defendant's attorney Kolb was in court at the time the cause was set for trial, and that he consented thereto. This is not denied. The fact that defendant's attorney withdrew from the cause after serving notice on defendant of such withdrawal, does not excuse defendant for his neglect.

The order of the Circuit Court, vacating the judgment is reversed, and the cause is remanded with the direction that the order vacating the judgment be set aside, and that the judgment stand in full force and effect.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

attorney, and it is recited in the affidavit filed by plaintiff's attorney, that defendant's attorney told him in court at the time the cause was set for trial, and that he connected thereto. This is not denied. The fact that defendant's attorney withdrew from the cause after serving notice on defendant of such withdrawal, does not excuse defendant for his neglect. The order of the Circuit Court, vacating the judgment is reversed, and the cause is remanded with the direction that the writ restoring the judgment be set aside, and that the judgment stand in full force and effect.

REVEREND THE HONORABLE THE JUDGE OF THE CIRCUIT COURT.

WITNESSED, P. J. AND ALISON, J. J. JUDGE.

37392

JACOB H. JAFFE,

Appellee,

v.

SCHULTER & CO., INC., a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 642⁵

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against defendant for the sum of \$2,050.00, \$205.00 attorney's fees, and costs of suit. The action is based on Section 37 of the Illinois Securities Act, (Oahill's Ill. Rev. Stat. 1931, p. 784) and it is alleged inter alia that on January 30th, 1929, defendant sold and delivered to plaintiff two American Department Store Corporation of Pennsylvania 6% debenture bonds, maturing December 1st, 1948, and that plaintiff paid for the bonds the sum of \$2,070.00. It is further alleged that the bonds were not securities under Class A, B or C, but were under Class D of the Act, as described in Section A thereof; that neither before the sale, nor at any time thereafter, did defendant file with the Secretary of State of Illinois any of the documents required by Section 9 of the Act; that the issuer is a foreign corporation of the State of Pennsylvania, and has not complied with the law regulating the admission of foreign corporations to do business in the State of Illinois, as required by Section 39 of the Illinois Securities Act, and that, therefore, the sale was void, and that the plaintiff is entitled to recover the amount paid for the bonds, together with attorney's fees, as provided by law; that plaintiff had made a tender of the debenture to the defendant, and that the tender was refused. After the original statement of claim was filed, amendments were filed, setting up in greater detail defendant's alleged failures to comply with the Securities Act.

STATE

JACOB H. BAKER,

Appellant,

v.

SCHEIDT & CO., INC., a corporation,

Appellee.

ATTORNEY AT LAW

CHICAGO, ILL.

BY COUNSEL,

279 I.A. 642

THE HONORABLE JUSTICE OF THE PEACE OF THE COUNTY OF COOK, ILL.

This is an appeal from a judgment of the Municipal Court

of Chicago against defendant for the sum of \$2,000.00, \$200.00

attorney's fees, and costs of suit. The action is based on Section

27 of the Illinois Securities Act, (Smith's Ill. Rev. Stat. 1921,

p. 784) and it is alleged inter alia that on January 20th, 1922,

defendant sold and delivered to plaintiff two American bonds, maturing

State Corporation of Pennsylvania 3 1/2 percent bonds, maturing

December 1st, 1942, and that plaintiff paid for the bonds on the

sum of \$2,000.00. It is further alleged that the bonds were not

registered under Class A, B or C, but were under Class D of the Act,

as described in Section A thereof; that neither before the sale,

nor at any time thereafter, did defendant file with the Secretary of

State of Illinois any of the documents required by Section 27 of the

Act; that the issuer is a foreign corporation of the State of

Pennsylvania, and has not complied with the law regulating the

admission of foreign corporations to do business in the State of

Illinois, as required by Section 26 of the Illinois Securities Act,

and that, therefore, the sale was void, and that the plaintiff is

entitled to recover the amount paid for the bonds, together with

attorney's fees, as provided by law; that plaintiff had made a tender

of the amount to the defendant, and that the tender was refused.

Let the original statement of claim and filed, amendments and

filed, setting up in proper detail defendant's alleged failure to

comply with the Securities Act.

There is no question of fact here involved. All the facts regarding the transaction in question are agreed to.

The record shows that on December 8th, 1928, the Secretary of State of the State of Illinois gave approval to defendant for the sale by it in the State of Illinois of \$100,000.00 of the debentures of the American Department Store Corporation of Pennsylvania. On January 8th, 1929, an extension was granted to defendant to file additional information in regard thereto by February 8th, 1929. On January 30th, 1929, the sale of the debentures in question was made by defendant.

By Section 7 of the act in question, which is entitled "An Act relating to the sale or other disposition of securities, and providing penalties for the violation thereof and to repeal acts in conflict therewith," (Cahill's Ill. Rev. Stat. 1931, p. 776) it is provided:

"By and with the consent and approval in writing of the Secretary of State any security in Class 'C' may be offered for sale or sold before the filing of the statement with respect thereto herein above in paragraph (a) of this section seven (7) referred to, anything in this statute to the contrary notwithstanding such consent to be conditioned upon there being deposited in the office of the Secretary of State by the issuer or any party interested in the sale of such security.:

1. A notice briefly describing the securities to be offered and stating the price at which such securities are to be offered to the public, the amount of the issue and the amount to be sold in Illinois;

2. The fee with respect to such securities prescribed in section 26 of this statute;

3. A copy of the circular to be used in selling or offering for sale such securities;

4. Such additional information as may be required by the Secretary of State; provided that within thirty days after the deposit of such documents, or within such further time as the Secretary of State may prescribe, there shall be filed in the office of the Secretary of State the statement with respect to such security provided for in paragraph (a) of this section seven (7); and further provided, that no issuer or other party shall offer, advertise or sell any such security prior to the filing by the Secretary of State of the statement hereinabove in paragraph (a) prescribed unless such issuer or other party shall have on file in the office of the Secretary of State an irrevocable consent and power of attorney with respect to the sale of Class 'C' securities as provided in section 16 of this Act; and shall also have on file in the office of the Secretary of State a good and sufficient bond in the sum of not less than \$50,000.00 payable to the

There is no question of fact here involved. All the

facts regarding the transaction in question are agreed to.

The record shows that on December 22d, 1929, the Secretary

of State of the State of Illinois gave approval to statement for

the sale by it in the State of Illinois of \$500,000.00 of the

securities of the American Department Store Corporation of Pennsylvania-

Inc. On January 23d, 1930, an extension was granted to defendant

to file additional information in regard thereto by February 23d,

On January 30th, 1930,

By Section 7 of the act in question, which is entitled

"An act relating to the sale of other disposition of securities,

and providing penalties for the violation thereof and to repeal

acts in conflict therewith," (O'Neill's Ill. Rev. Stat., 1921, p. 728)

it is provided:

"Any and with the content and approval in writing of

the Secretary of State and Secretary of State, may be

offered for sale or sold before the filing of the state-

ment with respect thereto herein above in paragraph (a)

of this section never (v) referred to, anything in this

statement to the contrary notwithstanding such consent to

be conditioned upon there being deposited in the office of

the Secretary of State by the issuer or any party interested

in the sale of such securities:

1. A notice briefly describing the securities to be

offered and stating the price at which such securities are

to be offered to the public, the amount of the issue and

the amount to be sold in Illinois;

2. The fee with respect to such securities prescribed

in section 26 of this act;

3. A copy of the circular to be used in selling or

offering for sale such securities;

4. Such additional information as may be required by

the Secretary of State; provided that within thirty days

after the deposit of such securities, or within such longer

time as the Secretary of State may prescribe, there shall be

filed in the office of the Secretary of State the statement

with respect to such security provided for in paragraph (a)

of this section never (v) and further provided, that no

issuer or other party shall offer, advertise or sell any such

security prior to the filing of the statement at home of the

statement hereinabove in paragraph (a) prescribed unless such

issuer or other party shall have in the office of the

Secretary of State an irrevocable consent and power of attorney

with respect to the sale of the securities as provided

in section 16 of this act; and shall also have on file in

the office of the Secretary of State a good and valid

bond in the sum of not less than \$50,000.00 payable to the

People of the State of Illinois, for the protection, use and benefit of purchasers and of all persons in interest, executed by a surety or guaranty company authorized to do business in this State conditioned that in the event the statement with respect to any securities shall not be filed, as above provided, the obligor in such bond will repay, to any purchaser from such obligor, on demand and tender of such securities, the purchase price paid therefor."

The point made here is that because the Secretary of State made the order requiring that the additional information be furnished by defendant thirty one days after the deposit of the original documents and the approval of the sale of these ^{debentures} ~~debentures~~ on December 8th, 1928, rather than in thirty days after this date, the plaintiff can recover the money paid therefor. It is not suggested that the statute was not complied with in other particulars, nor that by the original filing and approval the securities were not qualified under "Class C", as defined by the statute, (Cahill's Ill. Rev. Stat. 1931, p. 775) and could have been sold as such, if the sale had been made within thirty days after December 8th, 1928, or if the extension of time for furnishing further information had been made within the thirty day period.

In Whalin v. City of Macomb, 76 Ill. 49, prosecution was begun against a licensed saloon keeper for selling liquor contrary to the ordinance of the city regulating such sales by licensed persons. It was insisted that because by the charter of the city of Macomb, it was provided that a digest of the ordinances of the city should be published in one year after the granting of the charter, and a like digest thereof published within every period of five years thereafter, and as such publications were not made as required by the charter, the ordinance was ineffective. On this question, the Supreme Court said:

"The publication seems designed merely for the convenience of those whose duties or necessities require that they should be familiar with the ordinances, it being entirely independent from that required prior to the ordinance being in force as a municipal law - which is shown by the record

people of the State of Illinois, for the protection, and the benefit of purchasers and of all persons in interest, extended by a surety or guaranty company authorized to do business in this State conditional that in the event the statement with respect to any securities shall not be filed, as above provided, the obligor in such bond will repay, to any purchaser from such obligor, on demand and tender of such securities, the purchase price paid therefor."

The point made here is that because the Secretary of State made the order recognizing that the additional information be furnished by defendant thirty one days after the deposit of the original documents and the approval of the sale of these debentures on December 28th, 1928, rather than in thirty days after this date, the plaintiff can recover the money paid therefor. It is not suggested that the statute was not complied with in other particulars, nor that by the original filing and approval the securities were not qualified under "Class C", as defined by the statute, (Chaplin's Ill. Rev. Stat., 1921, p. 775) and could have been sold as such, if the sale had been made within thirty days after December 28th, 1928, or if the extension of time for furnishing further information had been made within the thirty day period.

In Chaplin v. City of Chicago, 78 Ill. 49, prosecution was begun against a licensed saloon keeper for selling liquor contrary to the ordinance of the city regulating such sales by licensed persons. It was insisted that because by the charter of the city of Chicago it was provided that a digest of the ordinances of the city should be published in one year after the granting of the charter, and a fine against the defendant could not be levied until one year after the charter, and as such publications were not made as required by the ordinance, the ordinance was inoperative. On this question, the

Illinois Court said:
"The publication seems designed merely for the convenience of those who desire to ascertain the laws of the State, and is not intended to be a condition precedent to the enforcement of the ordinance, it being entirely immaterial whether the ordinance was published or not prior to the enforcement of the ordinance, which is shown by the record."

to have been properly made.

A familiar common law rule, repeatedly recognized by this court, is: 'Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer.'

In Cooley's Constitutional Limitations, Eighth Edition, p. 158, it is said:

"Those directions which are not of the essence of the things to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory, and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."

There is nothing in the true intent, nor in the wording of the act which suggests why the order extending the time for furnishing this required information should have been made in thirty days, rather than in thirty one days after the original filing, and we are of the opinion that it would be a forced construction of the statute to hold that under its terms, the Secretary of State was acting contrary thereto when he made the order as he did. We are also of the opinion that, insofar as the record indicates, there had been a compliance with the requirements of the statute when the sale was made. Therefore, the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

to have been properly made.
A familiar common law rule, repeatedly recognized by this court, is: 'where a statute specifies the time within which a public officer is to perform an official duty, and the rights and duties of others, it will not be considered an directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer.'

In *People's ex rel. v. Board of Supervisors*, 100 N.Y. 201, 1886.

p. 126, it is said:

"Those directions which are part of the essence of the thing to be done, but which are given with a view merely to the prompt, orderly and efficient execution of the thing, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory, and in the case of such directions, it is the duty of the officer to obey them, if they are still in the time of the statute, it may still be sufficient, in such cases, to have complied with the substantial purpose of the statute."

There is nothing in the true intent, nor in the wording of the act which suggests why the order extending the time for furnishing this required information should have been made in thirty days, rather than in thirty one days after the original filing, and we are of the opinion that it would be a forced construction of the statute to hold that under its terms, the Secretary of State was acting contrary thereto when he made the order as he did. We are also of the opinion that, insofar as the record indicates, there had been a compliance with the requirements of the statute when the sale was made. Therefore, the judgment of the Municipal Court is reversed and the cause remanded.

REVEREND AND HONORABLE

WILLIAM F. WILSON, J. CLERK.

37402

135
FRANK R. CUMMINGS and MARY F. CUMMINGS,

APPEAL FROM

Appellants,

SUPERIOR COURT

v.

GEORGE W. TORPE,

COOK COUNTY.

Appellee.

279 I.A. 643¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of the Superior Court of Cook County against them for costs of suit. A jury trial was had, and the verdict was for defendant, upon which verdict the judgment was entered. The action is based upon a claim that plaintiffs were defrauded by defendant in a real estate deal. The issues were made upon plaintiffs' declaration, and general and special pleas filed by defendant.

It is alleged generally that plaintiffs were the owners of a parcel of real estate located at Summerdale and Hoyne Avenues in the city of Chicago, improved with a modern brick fourteen apartment building, valued at upwards of \$85,000.00, subject to a mortgage of \$57,000.00, from which building they received a gross income of approximately \$12,000.00. The abstract does not state whether this \$12,000.00 income was yearly or not, but we presume that is what is to be implied from the statement. It is further alleged that defendant was at the time in question a real estate broker in the city of Chicago, and that he had been for many years the agent and advisor of plaintiffs in various prior real estate deals and transactions; that about March 1st, 1930, plaintiffs had presented to them by persons other than defendant, a suggestion that they trade their interest in their apartment building for other properties; that they submitted this trading proposition to defendant, giving him a description of the properties for which they were asked

UNITED STATES

WESTERN UNION TELEPHONE COMPANY

SUPREME COURT

APPELLANTS

v.

WESTERN UNION TELEPHONE COMPANY

APPELLEES

27102 I.A. 643

THE UNITED STATES DEPARTMENT OF JUSTICE

This is an appeal by plaintiffs from a judgment of the

Superior Court of Cook County against them for costs of suit. A

jury trial was had, and the verdict was for defendant, upon which

verdict the judgment was entered. The action is based upon a claim

that plaintiffs were defrauded by defendant in a real estate deal.

The issues were upon plaintiffs' declaration, and General

and special pleas filed by defendant.

It is alleged generally that plaintiffs were the owners

of a parcel of real estate located at Humboldt and Maple Avenues

in the city of Chicago, improved with a modern brick fourteen

apartment building, valued at upwards of \$85,000.00, subject to a

mortgage of \$27,000.00, from which building they received a gross

income of approximately \$12,000.00. The statement does not state

whether this \$12,000.00 income was yearly or not, but we presume

that is what is to be implied from the statement. It is further

alleged that defendant was at the time in question a real estate

broker in the city of Chicago, and that he had been for many years

the agent and adviser of plaintiffs in various prior real estate

deals and transactions; that about March 1st, 1930, plaintiffs had

presented to them by persons other than defendant, a suggestion that

they trade their interest in their apartment building for other

properties; that they submitted this trading proposition to defendant,

giving him a description of the properties for which they were asked

to trade their apartment building; that defendant agreed to appraise the properties offered in trade, and to advise plaintiffs as to the advisability of the proposed deal; that plaintiffs agreed with defendant that they would pay him the usual brokerage commission on a trade or exchange on the basis of the property value of \$85,000.00 for their apartment building; that defendant reported to plaintiffs that he had inspected and approved the properties offered them in trade, and that he, defendant, found one of them to be a three story apartment building valued at \$26,000.00, subject to a mortgage of \$19,000.00; a vacant lot in Deerfield, Illinois, which he valued at \$1,000.00, which lot was free and clear of all incumbrances, and another vacant lot on Parnell Avenue, free of incumbrance, and valued at \$2,500.00; also a tract of land near Blue Island, Illinois, valued by defendant at \$9,600.00, upon which there was a balance due under a contract of purchase amounting to \$1,800.00. In addition to the above properties offered in trade and submitted to defendant for his judgment and appraisal, it is alleged that there was also offered a \$3,000.00 first mortgage and a \$1,000.00 second mortgage, together with the notes secured thereby, on eight vacant lots in Waukegan, Illinois; that defendant told plaintiffs he had examined all these properties, for which it was proposed that they exchange their interest in the apartment building, and that he stated to them that for trading purposes, these various properties were superior in value and worth to plaintiffs' apartment building, and that he advised them to trade their apartment building for such properties, and that defendant further told them that if they would do so, he would be enabled to exchange the various properties, received by them in exchange, for a building in the vicinity of Oakdale Avenue and Halsted Street, in the city of Chicago, which they desired, and that in addition to securing the last mentioned property, he would secure for plaintiff some cash in this trade. It is alleged that he

to trade their apartment building; that defendant agreed to appraise the properties offered in trade, and to advise plaintiff as to the advisability of the proposed deal; that plaintiff agreed with defendant that they would pay him the usual brokerage commission on a trade or exchange on the basis of the property value of \$25,000.00 for their apartment building; that defendant reported to plaintiff that he had inspected and approved the properties offered them in trade, and that he, defendant, found one of them to be a three story apartment building valued at \$25,000.00, subject to a mortgage of \$12,500.00; a vacant lot in Deerfield, Illinois, which he valued at \$1,000.00, which lot was free and clear of all incumbrances, and another vacant lot on Fernell Avenue, free of incumbrance, and valued at \$2,500.00; also a tract of land near Mine Island, Illinois, valued by defendant at \$3,000.00, upon which there was a balance due under a contract of purchase amounting to \$1,000.00. In addition to the above properties offered in trade and submitted to defendant for his judgment and appraisal, it is alleged that there was also offered a \$3,000.00 first mortgage and a \$1,000.00 second mortgage, together with the notes secured thereby, on eight vacant lots in Wisconsin, Illinois; that defendant told plaintiff he had examined all these properties, for which it was proposed that they exchange their interest in the apartment building, and that he stated to them that for better or worse, these various properties were equivalent in value and worth to plaintiff's apartment building, and that he advised them to trade their apartment building for such properties, and that defendant further told them that if they would do so, he would be enabled to exchange the various properties, received by them in exchange, for a building in the vicinity of Oakdale Avenue and Halsted Street, in the city of Chicago, which they desired, and that in addition to securing the first mentioned property, he would secure for plaintiff some cash in this trade. It is alleged that he

further stated to them that if plaintiffs needed immediate funds, he could and would cash some of the mortgages received in such trade. It is alleged that, relying upon defendant's statements, plaintiffs entered into a contract for the exchange of their building for these various properties, and paid defendant a commission of \$2,250.00. It is further alleged that all of the statements made by defendant as to the values of these properties, for which they exchanged their building, were false, and that defendant made such false statements for the sole purpose of inducing plaintiffs to enter into the deal so that he might collect from them the commission herein referred to. Plaintiffs' claim for damages amounts to \$35,000.00, which damages, it is alleged, they have sustained by reason of defendant's alleged fraud.

Frank R. Cummings, one of the plaintiffs, testified in substance that he was employed as a chauffeur, and that Mary F. Cummings, the other plaintiff, is his wife; that in 1921 defendant sold a building for plaintiffs for \$11,200.00, and that they paid him a commission on the sale; that thereafter, through defendant, they bought a three flat building at 3538 Rita Avenue, and that they paid him a commission on \$12,000.00, the amount of the deal; that in 1926 plaintiffs sold the Rita Avenue property through another broker for \$19,500.00, but that they paid defendant \$25.00 to close the deal for them. This witness further testified to the effect that in January, 1930, plaintiff, together with his wife, called on defendant Torpe at his office; that plaintiff told Torpe he would like to trade his apartment building for a building in another neighborhood; that he then gave Torpe a statement of the gross and net income of his, plaintiff's, building; that Torpe told plaintiff that if he would give the defendant "an exclusive sale of this building", defendant would be able to dispose of it and get a three apartment building free and

Further stated to them that if plaintiffs needed immediate funds, he could and would cash some of the mortgages received in such trade. It is alleged that, relying upon defendant's statements, plaintiffs entered into a contract for the exchange of their building for these various properties, and paid defendant a commission of \$2,500.00. It is further alleged that all of the statements made by defendant as to the values of these properties, for which they exchanged their building, were false, and that defendant made such false statements for the sole purpose of inducing plaintiffs to enter into the deal so that he might collect from them the commission herein referred to. Plaintiffs' claim for damages amounts to \$25,000.00, which amount, it is alleged, they have sustained by reason of defendant's alleged fraud.

Frank M. Cummings, one of the plaintiffs, testified in substance that he was employed as a chauffeur, and that Mary E. Cummings, the other plaintiff, is his wife; that in 1921 defendant sold a building for plaintiffs for \$11,000.00, and that they paid him a commission on the sale; that thereafter, through defendant, they bought a three flat building at 3535 21st Avenue, and that they paid him a commission on \$12,000.00, the amount of the deal; that in 1922 plaintiffs sold the 21st Avenue property through another broker for \$12,500.00, but that they paid defendant \$25.00 to close the deal for them. This witness further testified to the effect that in January, 1930, plaintiffs, together with his wife, called on defendant Torres at his office; that plaintiffs told Torres he would like to trade his apartment building for a building in another neighborhood; that he had four other statements at the time and was not aware of his plaintiffs' building; that Torres said plaintiffs told it he would not see defendant as exclusive sale of this building; defendant would be able to dispose of it and get a four apartment building from and

clear of all debts and incumbrances, and that at that time, defendant told plaintiff his building was worth \$85,000.00, but that he had better list it at \$73,000.00 so that plaintiff would not have to pay defendant such a large commission. Plaintiff further testified to the effect that on March 1st, 1930, he, together with his wife, called on defendant and presented a list of several pieces of real estate, which he had obtained from another broker, and that Torpe told plaintiff that "it does not look very good, it is too scattered. I will examine and appraise it, and let you know all about it. If it is a good deal, I will let you make it, and if it is not, I won't let you make it. It will take me about a week or ten days to do this. I will personally, myself, go out and see every piece and parcel of it; if I find it to be worth the money they are asking for it, and a good deal for you to make, I will let you make it, and if I don't find it to be a good deal, I won't let you make it." Plaintiff also stated that on March 8th, 1930, in the presence of plaintiff's wife and a Mr. and Mrs. Schneider, defendant stated to plaintiff, "Now, I have examined each and every piece and parcel of this property, and I find it to be wonderful in every way, and worth much more than Mr. Karttunen is charging for it. I have appraised it as to its value, that acreage out there in Blue Island is wonderful;" that as to the Foster Avenue property, defendant told plaintiff, "It is a fine three story flat building, worth more than \$26,000.00." This witness testified that defendant told him that he defendant had examined the lot in Deerfield, and the property in Waukegan, upon which the mortgage proposed in exchange was given, and found that these properties were worth all that they were reported to be; that at this time, defendant stated to plaintiff that if he needed cash, he could "swing it at once for the full cash value;" that upon these representations, he, the witness, and his wife, signed the contract for the exchange of

clear of all debts and incumbrances, and that at that time, defendant
told plaintiff his building was worth \$25,000.00, but that he had
better list it at \$15,000.00 so that plaintiff would not have to
pay defendant such a large commission. Plaintiff further testified
to the effect that on March 1st, 1936, he, together with his wife,
called on defendant and presented a list of several pieces of real
estate, which he had obtained from another broker, and that forgo
told plaintiff that "it does not look very good, it is too scattered.
I will examine and appraise it, and let you know all about it. If
it is a good deal, I will let you make it, and if it is not, I won't
let you make it. It will take me about a week or ten days to do
this. I will personally, myself, go out and see every piece and
parcel of it; as I find it to be worth the money they are asking for
it, and a good deal for you to make, I will let you make it, and if
I don't find it to be a good deal, I won't let you make it." Plaintiff
also stated that on March 8th, 1936, in the presence of plaintiff's
wife and a Mr. and Mrs. Schneider, defendant stated to plaintiff,
"Now, I have examined each and every piece and parcel of this property
and I find it to be wonderful in every way, and worth much more than
Mr. Karttunen is charging for it. I have appraised it as to its
value, that covers out there in Mine Island is wonderful;" that as
to the Foster Avenue property, defendant told plaintiff, "it is a fine
piece of property that will sell for \$10,000.00." This witness
testified that defendant told him that he defendant had examined the
lot in question, and the property in question, upon which the
witness resided in exchange was given, and found that these prop-
erty were worth all that they were reported as; that at that time,
defendant stated to plaintiff that it he needed cash, he would "swing
it at once for the full cash value," and when these transactions
were, the witness, and his wife, signed the contract for the exchange of

properties. His further testimony was to the effect that he afterwards learned that the properties for which he had exchanged his flat building, were of little value.

Various other witnesses were produced by plaintiff to substantiate this witness' testimony as to defendant's representations.

Defendant testified in substance that he had been in the real estate business in Chicago for 32 years, and that at the time of giving his testimony, his office was located at 2358 Lincoln Avenue, in the city of Chicago; that he first met the plaintiffs in 1921, when they came to him for the purpose of purchasing some real estate on Oakdale Avenue; that later, he acted as a broker in the purchase of a piece of property on Rita Avenue in Chicago; that he never collected the rents or managed any of these buildings; that the first time he talked with plaintiffs with reference to the fourteen flat building in question in this suit was in January, 1930; that he had nothing to do with the purchase of this building by the plaintiffs, nor had he anything to do with the management of the building, or the collection of the rents in connection with it; that at this time, Mr. Cummings told the witness that he, Cummings, was not in a position to hold this property on account of various payments coming due, and because of the vacancies existing and of expected vacancies to come, and that he wanted to make a deal with it. The witness testified that he told Cummings that it would be impossible to make a sale of the property, but that the witness might be able to make a trade; that the defendant stated that he, plaintiff, was trying to get a piece of property near Oakdale Avenue, where the plaintiff had formerly lived; that plaintiff quoted a price of \$85,000.00 on his apartment building, which the witness said was too high, and that Cummings then said he would sell it for \$73,000.00. The witness then asked Cummings for the exclusive agency for the sale of the

properties. His further testimony was to the effect that he afterwards learned that the properties for which he had exchanged his first building, were of little value.

Various other witnesses were produced by Plaintiff to

substantiate this claim; but in his testimony he is inconsistent. Defendant testified in substance that he had been in the real estate business in Chicago for 25 years, and that at the time of giving his testimony, his office was located at 2328 Lincoln Avenue, in the city of Chicago; that he first met the plaintiff in 1921, when they came to him for the purpose of purchasing some real estate on Oakdale Avenue; that later, he acted as a broker in the purchase of a piece of property on Oak Avenue in Chicago; that he never collected the rents or managed any of these buildings; that the first time he talked with plaintiff with reference to the fourteen flat building in question in this suit was in January, 1930; that he had nothing to do with the purchase of this building by the plaintiff, nor had he anything to do with the management of the building, or the collection of the rents in connection with it; that at this time, Mr. Cummings told the witness that he, Cummings, was not in a position to hold this property on account of various payments coming due, and because of the vacancies existing and of expected vacancies to come, and that he wanted to make a deal with it. The witness testified that he told Cummings that it would be impossible to make a sale of the property, but that the witness might be able to make a trade; that the defendant stated that he, plaintiff, was trying to get a piece of property near Oakdale Avenue, where the plaintiff had formerly lived; that plaintiff quoted a price of \$22,000.00 on this apartment building, which the witness said was too high, and that Cummings then said he would sell it for \$15,000.00. The witness then said Cummings for the exclusive agency for the sale of the

property, and that thereupon Cummings executed such an agreement. Defendant testified that he made an effort to sell the property, advertised it in various papers at his own expense, but that he met with no success in this regard; that the next meeting he had with plaintiffs was in February, 1930, when they came to his office and told him that a man by the name of Karttunen had submitted to plaintiffs a list of properties which he, Karttunen, desired to trade for their apartment building; that plaintiff, Frank R. Cummings, said that he had seen some of the properties, and that he would entertain such a deal because he was not in shape to hold his apartment building any longer. Defendant further testified in substance that he and Cummings went over the prices, and Cummings said he was willing to go ahead on the deal, as proposed, but that he, defendant, had never agreed to appraise the properties, and had never used the word "appraisement" in connection therewith, because he did not consider himself to be an appraiser. This witness also testified that neither of the plaintiffs ever consulted him about appraising any properties, and that he never did any appraising of real estate for them, nor did he ever agree to do any such work. Defendant further testified that he drew the original contract for the exchange of these properties, and that Cummings and his wife and Karttunen and his wife signed the contracts; that Karttunen had a lawyer representing him in the transaction, and that he, the witness, went to the Chicago Title & Trust Company in connection with having an abstract of title brought down to date; that the deal was closed in his office, and that a man named Sampson, attorney for the Examiner of Titles at the Chicago Title & Trust Company, at Cummings' request, represented Cummings in the transaction.

Various other witnesses for both sides testified as to various details concerning this trade, all of which testimony was submitted to the jury.

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for their apartment building; that plaintiff, Frank R. Cummings, said
that he had none of the properties, and that he would entertain
such a deal because he was not in a position to hold his apartment building
any longer. Defendant further testified in substance that he and
Cummings went over the prices, and Cummings said he was willing to
go ahead on the deal, as proposed, but that he, defendant, had never
agreed to appraise the properties, and had never read the word
"appraisement" in connection therewith, because he did not consider
himself to be an appraiser. This witness also testified that neither
of the plaintiffs ever consulted him about appraising any properties,
and that he never did any appraising of real estate for them, nor
did he ever agree to do any such work. Defendant further testified
that he knew the original contract for the exchange of these prop-
ties, and that Cummings and his wife and Karttunen and his wife
signed the contracts; that Karttunen had a lawyer representing him
in the transaction, and that he, the witness, went to the Chicago
Title & Trust Company in connection with having an abstract of title
brought down to date; that the deal was closed in his office, and
that a man named Sampson, attorney for the Examiner of Titles at
the Chicago Title & Trust Company, at Chicago, Illinois, represented
Cummings in the transaction.
Various other witnesses for both sides testified as to
various details concerning this trade, all of which testimony was
submitted to the jury.

The ground for reversal principally urged here is that defendant's counsel made improper statements in his argument to the jury. It is also urged that the testimony of one of the defendant's witnesses was repudiated by his affidavit after the trial; that the verdict is contrary to the manifest weight of the evidence, and that the agent is liable to his principal for fraud and deceit.

From the statements of counsel, we receive the impression that defendant had formerly sued plaintiff for commissions alleged to be due in the transaction; also that a complaint had been made to the Department of Trade and Registration of the State of Illinois with regard to defendant's actions in connection with the matter in controversy, and that an attempt had been made to cause the revocation of defendant's license as a real estate broker on account of this transaction. The argument of defendant's counsel to the jury, to which plaintiff objects, as stated in the brief, is as follows:

"Now, talk about persecution. Just because a man wants his commission - and sues for it in the Municipal Court - then they try to get him out of business by taking his license away, but he is still doing business."

Also the following:

"Here is what I mean. I attempted this morning to explain to you that if there is any judgment in this case, even for \$10.00, under the law, because it is a fraud case, a malice case, Torpe can be sent to jail. When I attempted to say that to you this morning his honor, the court, sustained an objection, but now I am permitted to tell you what the law is."

We see nothing in this argument which would justify a reversal.

On the trial of the cause, one Karttunen testified that he had accompanied the plaintiff and his wife on a trip to view the properties for which plaintiffs agreed to exchange their apartment building. On the motion for a new trial, which was overruled, plaintiff presented an affidavit of Karttunen in which he stated that he Karttunen, was mistaken in this regard, and this fact is urged as one of the reasons why a new trial should have been granted, and why the judgment should be reversed. Plaintiffs had engaged in many real

The ground for reversal principally urged here is that defendant's counsel made improper statements in his argument to the jury. It is also urged that the testimony of one of the defendant's witnesses was repudiated by his affidavit after the trial; that the verdict is contrary to the manifest weight of the evidence, and that the agent is liable to his principal for fraud and deceit. From the statements of counsel, we receive the impression that defendant had formerly sued plaintiff for commissions alleged to be due in the transaction; also that a complaint had been made to the Department of Trade and Regulation of the State of Illinois with regard to defendant's actions in connection with the matter in controversy, and that an attempt had been made to cause the revocation of defendant's license as a real estate broker on account of this transaction. The argument of defendant's counsel to the jury, as stated in the brief, is as follows:

"Now, talk about personality. Just because a man wants his commission - and even for it is the military force - then they say to get his out of business. Taking his license away, but he is still doing business."

Also the following:

[illegible]

judgment should be reversed. Plaintiff has engaged in many real
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Hartman, was mistaken in this regard, and this fact is urged as one
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On the trial of the case, one Hartman testified that
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estate transactions, both in purchasing and trading, and whether the statement of Karttunen was true or not, we think is of slight importance. Plaintiffs had ample opportunity to view these properties on their own behalf, if they had desired to do so.

On the question as to whether the verdict was contrary to the manifest weight of the evidence, we have this to say. An examination of the record discloses that there was a great contrariety of testimony submitted to the jury on both sides on the questions involved; that the jury heard the witnesses, was properly instructed, and passed upon their credibility and the weight to be given to their testimony, and our conclusion is that the verdict and judgment should not be disturbed. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

estate transactions, both in purchasing and trading, and whether the statement of Kattunen was true or not, we think is of slight importance. Plaintiff had ample opportunity to view these properties on their own behalf, if they had desired to do so.

On the question as to whether the verdict was contrary to the weight of the evidence, we have this to say. In examination of the record discloses that there was a great discrepancy of testimony submitted to the jury on both sides on the questions involved; that the jury heard the witnesses, was properly instructed and passed upon their credibility and the weight to be given to their testimony, and our conclusion is that the verdict and judgment should not be disturbed. Therefore, the judgment is affirmed.

AFFIRMED.

WILLIAM L. JONES AND WILSON L. JONES.

37445

FLORENCE HORWITZ, also known
and described as MRS. HANS PAKULA,

Appellee,

v.

GREAT AMERICAN INSURANCE COMPANY OF
NEW YORK,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

279 I.A. 643²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for the sum of \$1,200.00, entered December 19th, 1933, against defendant, in a suit on an insurance policy. The trial was by jury, and the judgment was entered on the verdict.

On June 11th, 1929, the defendant issued to Florence Horwitz, now Florence Pakula, the wife of Hans Pakula, a policy of insurance, by which defendant agreed in consideration of the premium paid, to insure against loss one platinum diamond ring, center stone weighing $2\frac{1}{4}$ carats, and 36 small diamonds weighing about $\frac{3}{4}$ carat. In case of the loss of such ring, the amount agreed to be paid was \$1,200.00. The policy provides that immediate notice of loss of the goods insured shall be given, and that failure to give notice in three months shall invalidate the claim. The only question involved here is whether or not plaintiff has made sufficient proof of the loss of the ring, as claimed.

Plaintiff testified in substance that on May 29th, 1930, she lived with her husband at the Shoreham Hotel, 3318 Sheridan Road, in the city of Chicago, and occupied Apartment 203 on the second floor of this hotel; that she started to wash some dishes and removed the ring in question, together with her wedding ring, from her fingers and placed them in a cabinet in the kitchenette of said apartment; that about 12 o'clock noon of that day she left the apartment, closed and locked the entrance door to such apartment, and

1934

ELIZABETH HARRIS, also known as Mrs. HARRIS, and associated as Mrs. HARRIS, Appellee,

Appellant.

NEW YORK

Appellant.

279 I.A. 648

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court

of Cook County for the sum of \$1,500.00, entered December 18th, 1933, against defendant, in a suit on an insurance policy. The trial was by jury, and the judgment was entered on the verdict.

On June 15th, 1933, the defendant leased to Florence Harris, now Florence Harris, the wife of Hans Harris, a policy of insurance, by which defendant agreed in consideration of the premium paid, to insure against loss one platinum diamond ring, center stone weighing 24 carats, and 36 small diamonds weighing about 1 carat. In case of the loss of such ring, the amount agreed to be paid was \$1,500.00. The policy provided that immediate notice of loss of the goods insured shall be given, and that failure to give notice in three months shall invalidate the claim. The only question involved here is whether or not plaintiff has made sufficient proof of the loss of the ring, as claimed.

Plaintiff testified in substance that on May 23rd, 1930, she lived with her husband at the Monahan Hotel, 3316 Sheridan Street, in the city of Chicago, and occupied Apartment 303 on the second floor of this hotel; that she started to wash some dishes and removed the ring in question, together with her wedding ring, from her fingers and placed them in a cabinet in the kitchenette of said apartment; that about 12 o'clock noon of that day she left the apartment, closed and locked the entrance door to such apartment, and

as she was walking away she noticed a maid walking into the room; that she left the hotel, and after she had walked some distance, she noticed that she had left her rings in the apartment; that she was not well, and instead of going back to the hotel to look after her rings, she called on the telephone from a drug store to the clerk of the hotel and informed him she had left her rings in the apartment, and asked him to take care of them for her; that she then went to the loop district of Chicago on a street car; that she returned to the apartment about 5 o'clock in the afternoon, and was informed by the clerk that the rings had not been found; that she spoke to the manager of the hotel and to the housekeeper; that she made a search for the rings herself, but did not find them; that she afterwards found her wedding ring, but did not find the ring in question; that the police came and questioned the maid, who, together with other employees of the hotel, were searched, but that the diamond ring was not found and never has been found. She testified that she talked with a representative of the company about the loss of the ring about one week after its loss. Evidence was offered by plaintiff to the effect that written notice of the loss of the ring was given to defendant on June 20th, 1930.

Harry Pakula, a brother-in-law of plaintiff, testified that he had been in the wholesale jewelry business for a number of years; that the ring in question had been purchased from him by his brother, Hans Pakula, as an engagement ring for the plaintiff. This witness described the ring, and stated that its value in May, 1930, was \$1,200.00.

Hans Pakula, husband of plaintiff, testified that he had not seen the ring since May 29th, 1930.

For defendant, William Hozan, a window washer employed by the Shoreham Hotel, testified that when the plaintiff left the apartment, he and the maid were in the apartment; that Mr. Garney,

as she was walking away and noticed a maid walking into the room; that she left the hotel, and after she had walked some distance, she noticed that she had left her rings in the apartment; that she was not well, and instead of going back to the hotel to look after her rings, she called on the telephone from a drug store to the clerk of the hotel and informed him she had left her rings in the apartment, and asked him to take care of them for her; that she then went to the loop district of Chicago on a street car; that she returned to the apartment about 5 o'clock in the afternoon, and was informed by the clerk that the rings had not been found; that she spoke to the manager of the hotel and to the housekeeper; that she made a search for the rings herself, but did not find them; that she afterwards found her wedding ring, but did not find the ring in question; that the police came and questioned the maid, who, together with other employees of the hotel, were searched, but that the diamond ring was not found and never has been found. She testified that she talked with a representative of the company about the loss of the ring about one week after its loss. Evidence was offered by Plaintiff to the effect that written notice of the loss of the ring was given to defendant on June 30th, 1930.

Harry Pekala, a brother-in-law of Plaintiff, testified that he had been in the wholesale jewelry business for a number of years; that the ring in question had been purchased from him by his brother, Hans Pekala, as an engagement ring for the Plaintiff. This witness described the ring, and stated that its value in May, 1930, was \$1,200.00.

Hans Pekala, husband of Plaintiff, testified that he had not seen the ring since May 25th, 1930. For defendant, William Hovan, a window washer employed by the O'Hareman Hotel, testified that when the Plaintiff left the apartment, he and the maid were in the apartment; that Mr. Hovan,

representing the hotel company, and Mrs. Jamison, the housekeeper, came into the room about 15 or 20 minutes after Mrs. Pakula left and inquired about the ring; that he was searched by Mr. Carney, and that the ring was not found in his possession. The maid, who, as already stated, was searched, together with other employees of the hotel, testified that she made a search, but did not find the ring.

George B. Van Buren testified that he was an insurance adjuster; that about June 21st, 1930, he received from plaintiff a written notification of the loss of the ring in question; that prior to that time he had talked to the plaintiff at her home regarding the loss of the ring, and that he had such talk at the request of Haskell, Miller, Grossman & Company, general adjusters for the defendant; that at that time plaintiff made a hand written statement as to the loss of the ring; that on May 31st, 1930, he sent one Hansen out to investigate the loss, but that he received no notes of this person's investigation. It was admitted by defendant's counsel that defendant received a copy of the statement made by plaintiff as to the loss of her ring.

Defendant insists that plaintiff has failed to prove by a preponderance of the evidence that the ring was lost; that she has concealed material facts with regard to the loss, and that the court erred in giving certain instructions to the jury. The cause was submitted to a jury, and in so far as the question as to the proof of the loss of the ring is concerned, we are of the opinion that there was sufficient evidence of its loss submitted to the jury to justify the verdict. The instructions complained of, given on behalf of plaintiffs, are as follows:

"No. 4. The Court instructs the jury that under the policy of insurance sued upon in this case, it is not necessary for the plaintiff in order to recover in this case, to prove that the diamond ring in question was stolen or that said

representing the hotel company, and Mrs. Jamison, the housekeeper, came into the room about 15 or 20 minutes after Mrs. Kibula left and inquired about the ring; that he was answered by Mr. Jamison, and that the ring was not found in his possession. The maid, who, as already stated, was searched, together with other employees of the hotel, testified that she made a search, but did not find the ring. George B. Van Buren testified that he was an insurance

adjuster; that about June 21st, 1930, he received from plaintiff a written notification of the loss of the ring in question; that prior to that time he had talked to the plaintiff at her home regarding the loss of the ring, and that he had such talk at the request of Haskell, Miller, Grossman & Company, general adjusters for the defendant; that at that time plaintiff made a hand written statement as to the loss of the ring; that on May 21st, 1930, he sent one Hansen out to investigate the loss, but that he received no notes of this person's investigation. It was admitted by defendant's counsel that defendant received a copy of the statement made by plaintiff as to the loss of her ring.

Defendant insists that plaintiff has failed to prove by a preponderance of the evidence that the ring was lost; that she has concealed material facts with regard to the loss, and that the court erred in giving certain instructions to the jury. The court was submitted to a jury, and in so far as the question as to the proof of the loss of the ring is concerned, we are of the opinion that there was sufficient evidence of its loss exhibited to the jury to justify the verdict. The instructions complained of, given on behalf of

plaintiff, are as follows:

"Now, the Court instructs the jury that under the policy of insurance sued upon in this case, it is not necessary for the plaintiff in order to recover in this case, to prove that the diamond ring in question was stolen or that said

ring was stolen by any particular person or persons. It is sufficient, in order for the plaintiff to recover in this case, under the second count of the declaration as amended, for her to prove by a preponderance of the evidence that she lost said ring at the time and place in question, and that the whereabouts of said ring then became and is now unknown to the plaintiff.

No. 7. The Court instructs the jury that the policy of insurance sued upon in this case provides for payment to the plaintiff of an amount not exceeding the sum of \$1200.00 against all risks of loss, while in all situations, of the diamond ring in question. The Court further instructs you that if you believe from a preponderance of the evidence that at the time and place in question, the plaintiff lost the said ring or the said ring disappeared or that the said ring was stolen, and if you further believe from the evidence that the whereabouts of said ring then became and is now unknown to the plaintiff, and if you further believe that the plaintiff was not guilty as claimed by the defendant, then in either of said events, you should return a verdict in favor of the plaintiff and against the defendant."

Both of these instructions are predicated upon the theory that the defendant lost the ring, and we are of the opinion that the court did not err in instructing the jury as it did. Defendant's refused instructions are as follows:

"No. 1. If from the evidence and under the instructions of the Court you find that the plaintiff did not give to the defendant or to some of the agents of said defendant, immediate notice of the loss, if any, together with a full, fair and honest statement concerning the particulars of such loss, if any, then you will find the issues against the plaintiff and in favor of the defendant.

No. 3. If from all the evidence and under the instructions of the Court you find that the plaintiff has intentionally concealed the ring here in question, then you will find the issues in favor of the defendant."

From all the evidence, including that of defendant's adjuster, we can find nothing which would justify the giving of these two instructions. On the contrary, as stated, the evidence indicates that not only was a written notification of the loss given, but that shortly after the loss the agent of the defendant received a written report of the loss of the ring, and that a complete investigation was made by him through his representative of the whole transaction. In view of the fact that the jury heard and saw the witnesses, and that the evidence justified the verdict, we can find no reason why the judgment should be reversed. Therefore, the judgment is affirmed.

ring was stolen by any particular person or persons. It is sufficient, in order for the plaintiff to recover in this case, under the second count of the declaration as amended, for her to prove by a preponderance of the evidence that she lost said ring at the time and place in question, and that the whereabouts of said ring then became and is now unknown to the plaintiff.

No. 4. The Court instructs the jury that the policy of insurance was not in effect until the payment of the premium of \$100.00 was received. The Court further instructs the jury that all risks of loss, while in all other respects the same as in the policy, the Court further instructs the jury that if you believe from a preponderance of the evidence that at the time and place in question, the plaintiff lost the said ring on the said ring discovered on that the said ring was stolen, and if you further believe from the evidence that the whereabouts of said ring then became and is now unknown to the plaintiff, and if you further believe that the plaintiff was not guilty as charged by the defendant, then in view of all these facts, you should return a verdict in favor of the plaintiff and against the defendant.

Both of these instructions are predicated upon the theory that the defendant lost the ring, and we are of the opinion that the court did not err in instructing the jury as it did. Defendant's refusal to accept these instructions are as follows:

No. 1. It from the evidence and under the instructions of the Court you find that the plaintiff did not give to the defendant or to some of the agents of said defendant, immediate notice of her loss, it may, together with a full and correct statement concerning the particular ring lost, at any time you will find the issues against the plaintiff and in favor of the defendant.

No. 2. It from all the evidence and under the instructions of the Court you find that the plaintiff has not actually concealed the ring here in question, when you will find the issues in favor of the defendant.

From all the evidence, including that of defendant's adjuster we can find nothing which would justify the giving of these two instructions. On the contrary, as stated, the evidence indicates that not only was a written notification of the loss given, but that shortly after the loss the agent of the defendant received a written report of the loss of the ring, and that a complete investigation was made by him through his representative of the whole transaction. In view of the fact that the jury heard and saw the witnesses, and that the evidence justified the verdict, we find no reason why the plaintiff should be reversed. Therefore, the judgment is affirmed.

37460

CLARA ROGERS,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

279 I.A. 643³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County for the sum of \$2,900.00, entered in a suit against the City of Chicago by the plaintiff, Clara Rogers. The judgment was entered upon the verdict of a jury.

It is alleged in the declaration that plaintiff was injured through the negligence of the city in failing to keep a certain sidewalk in repair. The record indicates that plaintiff testified in substance that she resides at 1113 North Dearborn Street, Chicago, Illinois; that at the time she received the alleged injury, she was earning \$24.55 a week; that on June 13th, 1932, at about 8 o'clock in the evening, she was walking south on North Dearborn Street, the street on which she resided, and that in front of 1133 North Dearborn Street she stepped on a manhole cover with holes in it, which holes had been previously filled with glass, that she caught the heel of her shoe in one of the holes in this manhole cover, which caused her to fall, and that as a result of the fall, her left side was hurt and her left wrist broken. She also stated that as a result of the fall, she had black and blue spots on her hip and shoulder; that she was thereafter taken to a clinic on Chicago Avenue, and a splint was put on her arm; that after the third week subsequent to the accident, she went back to work with her arm in a sling and worked for a short time, but that she was discharged, presumably, because she could not do the work; that for a short time thereafter she did

27400

CLASS NUMBER

(REMARKS) (INITIALS)

v.

CITY OF CHICAGO, a Municipal Corporation,

(Defendant) vs.

COOK COUNTY.

279 I.A. 643

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County for the sum of \$2,800.00, entered in a suit against the City of Chicago by the plaintiff, Clara Rogers. The judgment was entered upon the verdict of a jury.

It is alleged in the declaration that plaintiff was injured through the negligence of the city in failing to keep a certain sidewalk in repair. The record indicates that plaintiff testified in substance that she resides at 1113 North Dearborn Street, Chicago, Illinois; that at the time she received the alleged injury, she was walking south on North Dearborn Street, the street on which she resided, and that in front of 1113 North Dearborn Street she stepped on a manhole cover with holes in it, which holes had been previously filled with glass, that she caught the heel of her shoe in one of the holes in this manhole cover, which caused her to fall, and that as a result of the fall, her left side was hurt and her left wrist broken. She also stated that as a result of the fall, she had black and blue spots on her hip and shoulder; that she was thereafter taken to a clinic on Chicago Avenue, and a splint was put on her arm; that after the splint was substituted for the accident, she went back to work with her arm in a sling and worked for a short time, but that she was disabled, necessarily, because she could not do the work; that for a short time thereafter she did

some light work, for which she received \$10.00 a week; that her left wrist and arm pain her all the time; that she was treated by a doctor approximately fifteen times, and that prior to the accident, her arm and wrist had never been injured. On cross-examination, she stated that she had seen this manhole cover before, and had walked around it, and that prior to that time, she had injured her ankle when an elevator fell, in which she was riding. As to the character and extent of her injuries, her testimony was corroborated by that of the physician who treated her.

Several witnesses testified on behalf of plaintiff to the effect that certain glass fillings had been out of the holes in the manhole cover in question for a considerable time prior to the time of the accident, leaving the cover in the condition described by plaintiff.

A photograph of the sidewalk and its surroundings, including the manhole cover in question, was introduced in evidence by defendant, and it was stipulated that it portrayed the scene of the accident and the condition of the sidewalk on June 24th, 1932, eleven days after the accident, and that it was in the same condition at the time of the accident as it was when the photograph was taken. Defendant offered no evidence other than this photograph.

It is the contention of defendant that the sidewalk was reasonably safe; that plaintiff had passed over the place several times a day and admitted that she was familiar with its condition; that her injury was slight, consisting of a small fracture of a small bone of the forearm; that the verdict is excessive, and that there is a variance between the pleading and the proof, in that she alleged that the accident happened in front of 1163 North Dearborn Street, and that she testified that it happened in front of 1133 North Dearborn Street. It is not claimed that the condition of the

some light work, for which she received \$10.00 a week; that her left wrist and arm pain her all the time; that she was treated by a doctor approximately fifteen times, and that prior to the accident, her arm and wrist had never been injured. On cross-examination, she stated that she had seen this manhole cover before, and had walked around it, and that prior to that time, she had injured her ankle when an elevator fell, in which she was riding. As to the character and extent of her injuries, her testimony was corroborated by that of the physician who treated her.

Several witnesses testified on behalf of plaintiff to the effect that certain glass shavings had been out of the holes in the manhole cover in question for a considerable time prior to the time of the accident, leaving the cover in the condition described by plaintiff.

A photograph of the sidewalk and its surroundings, including the manhole cover in question, was introduced in evidence by defendant, and it was stipulated that it portrayed the scene of the accident and the condition of the sidewalk on June 24th, 1932, eleven days after the accident, and that it was in the same condition at the time of the accident as it was when the photograph was taken. Defendant offered no evidence other than this photograph.

It is the contention of defendant that the sidewalk was reasonably safe; that plaintiff had passed over the place several times a day and admitted that she was familiar with its condition; that her injury was slight, consisting of a small fracture of a small bone of the forearm; that the verdict is excessive, and that there is a variance between the pleading and the proof, in that she alleged that the accident happened in front of Mrs. North Dearborn Street, and that she testified that it happened in front of 1111 North Dearborn Street. It is not claimed that the condition of the

manhole cover was not as described by the witnesses, nor that such condition had existed for a sufficient length of time for the city, in the exercise of ordinary care, to have repaired it. It is insisted by defendant that the statutory notice required to be served upon it showing the time and place of the alleged injury, was not served or filed.

There was offered and received in evidence over defendant's objection, what purported to be a copy of a notice of the time and place of the accident, alleged to have been served upon defendant. The notice, and what purports to show its receipt by defendant, read as follows;

"Notice.

State of Illinois)
County of Cook) SS.

To:
City of Chicago,
(Clerk) and City Attorney
and Corporation Counsel,
City Hall, Chicago.

You are hereby notified that Clara Rogers of the city of Chicago, County of Cook, State of Illinois, is about to file against the City of Chicago, on account of personal injuries sustained by her when she fell and stumbled on the sidewalk by reason of and as a result of a defect, hole and bad state of repair of and in the sidewalk in the City of Chicago, County of Cook, at 1163 North Dearborn Street on Monday, June 13, 1932, at about the hour of 8:30 P. M., and you are further notified that the following information is given to you as provided by Statute.

1. Name of Claimant and injured is Clara Rogers.
 2. Address of said person is 1113 North Dearborn Street, Chicago, Illinois.
 3. Date, Hour and place of accident are:
June 13, 1932 at 8:30 P.M. at and near 1163 North Dearborn Street, Chicago, Illinois, and on the sidewalk at said above address.
 4. Attending Physician:
Dr. F. G. Test, 30 North Michigan Avenue,
Chicago, (Office), 4620 Greenwood Avenue, Chicago, (residence),
Oakland 1633.
- Dated June 17, 1932

Clara Rogers
By: F. A. Gariepy
Her Attorney

Received a copy of this notice this 17th day of June, 1932.

1. Peter J. Brady, City Clerk, J. McCabe.
2. A. M. Smietanka, City Attorney, Per J.J."

whole cover was not as described by the witnesses, nor that such condition had existed for a sufficient length of time for the city, in the exercise of ordinary care, to have repaired it. It is insisted by defendant that the statutory notice required to be served upon it showing the time and place of the alleged injury, was not served or filed.

There was offered and received in evidence over defendant's objection, what purported to be a copy of a notice of the time and place of the accident, alleged to have been served upon defendant. The notice, and what purports to show its receipt by defendant,

were as follows:

"Notice.

County of Cook
State of Illinois

To:
City of Chicago,
(City) and City Railway,
and Corporation Company,
City Hall, Chicago.

You are hereby notified that about the month of May, 1932, at Chicago, County of Cook, State of Illinois, in about the time and place of accident set forth in the notice of personal injuries mentioned by her when she fell and sustained an injury to her back and as a result of a defective hole and had state of repair of and in the sidewalk in the City of Chicago, County of Cook, at the corner Harrison Street on Madison, June 13, 1932, at about the hour of 8:35 P. M., and you are further notified that the following information is given so you are provided by

1. Name of defendant and injured the City of Chicago.
2. Address of said person in 1115 North Dearborn Street, Chicago, Illinois.
3. Date, hour and place of accident set forth in the notice of personal injuries mentioned by her when she fell and sustained an injury to her back and as a result of a defective hole and had state of repair of and in the sidewalk in the City of Chicago, County of Cook, at the corner Harrison Street on Madison, June 13, 1932, at about the hour of 8:35 P. M., and you are further notified that the following information is given so you are provided by
4. Addressing Plaintiff:
- Dr. M. G. Test, 30 North Michigan Avenue, Chicago, (Illinois), 4323 Greenwood Avenue, Chicago, (Illinois).

Dated June 14, 1932

James Rogers
By: E. A. Gentry
Attorney

Received a copy of this notice this 17th day of June, 1932.
J. Peter J. Brady, City Clerk, J. McCord.

After the record was filed in this court, over defendant's objection, plaintiff offered and this court received evidence to the effect that the notice was actually served upon defendant.

The charge in the declaration is to the effect that the plaintiff suffered the injury complained of "in front of the house numbered 1163 North Dearborn Street, about 150 feet south of Division Street, and about 5 feet from the east curb of Dearborn Street, in the city of Chicago." The record and the abstract filed here on April 13th, 1934, indicate that plaintiff testified as stated, that the accident occurred at "1133" North Dearborn Street. Thereafter, on June 4th, 1934, plaintiff filed an additional abstract, which shows the following question asked of the plaintiff, and the answer thereto:

"Q. How wide is that sidewalk at that number, in front of 1163 that you have just mentioned, about how wide is it?

A. Just the ordinary width. I don't know the widths of the sidewalks."

This question and answer, as shown by the record, follow immediately after the plaintiff's presumed answer that the accident happened at "1133" North Dearborn Street.

As stated, plaintiff testified that she lived at 1113 North Dearborn Street, Chicago, Illinois. One of the witnesses testified that he lived at 1159 North Dearborn Street, in the city of Chicago, but defendant insists that there is no proof that the accident happened in the city of Chicago. We are of the opinion that from the foregoing testimony, the jury could reasonably conclude that the accident happened in the city of Chicago, and in front of 1163 North Dearborn Street in such city, as alleged. There is no evidence to the contrary. In the trial, there was no question raised as to when and where the accident happened, nor that it happened just as plaintiff said it did, and in the city of Chicago. The photograph

After the record was filed in this court, over defendant's objection, plaintiff offered and this court received evidence to the effect that the notice was actually served upon defendant.

The charge in the declaration is to the effect that the plaintiff entered the injury complained of "in front of the house numbered 1183 North Dearborn Street, about 150 feet south of Division Street, and about 5 feet from the east curb of Dearborn Street, in the city of Chicago." The record and the abstract filed here on April 1930, 1931, indicate that plaintiff testified as stated, that the accident occurred at "1183 North Dearborn Street. Therefore, on June 4th, 1934, plaintiff filed an additional abstract, which shows the following question asked of the plaintiff, and the answer thereto:

"Q. How wide is this sidewalk at that number, in front of 1183 North Dearborn Street, where the accident occurred?
A. That the ordinary width. I don't know the width of the sidewalk."
This question and answer, as shown by the record, follow immediately after the plaintiff's proposed answer. The court's decision is as follows:

It is stated, plaintiff testified that she lived at 1183 North Dearborn Street, Chicago, Illinois. One of the witnesses testified that he lived at 1180 North Dearborn Street, in the city of Chicago, but defendant insists that there is no proof that the accident happened in the city of Chicago. On the other hand, the jury found that the accident happened in the city of Chicago, and in front of 1183 North Dearborn Street in such city, as alleged. There is no evidence to the contrary. In the trial, there was no question raised as to when and where the accident happened, nor that it happened just as plaintiff said it did, and in the city of Chicago. The question

introduced by defendant shows the manhole cover to be in a sidewalk on what appears to be a thickly settled city street.

Defendant insists that because plaintiff testified that she had walked around this particular manhole cover before, and was familiar with it, that she was not in the exercise of ordinary care for her safety, because she did not take sufficient pains to avoid it at the time and place in question. She testified that the accident happened at 8 o'clock of the evening of June 13th, 1932, and we are not prepared to say that the jury was wrong when they determined that she was in the exercise of reasonable care for her safety when she stepped into this hole.

In Wicks v. Cunec-Henneberry Co., 234 Ill. App. 502, this court said:

"The law required plaintiff to exercise due care for her own safety before she would be entitled to recover, but this did not require that she continually keep her eyes down on the walk in front of her as she was walking. We think it clear, under the evidence, that whether plaintiff was exercising due care for her own safety and whether defendant was negligent in failing to keep the iron doors in a proper state of repair were for the jury. And upon a careful consideration of the record, we are unable to say that the finding of the jury in plaintiff's favor on both of these questions is against the manifest weight of the evidence."

Defendant complains of the following instruction:

"The court instructs the jury that if you find for the plaintiff and against the defendant in this case, you will be required to determine the amount of the damages, if any, which she ought to recover in this case. In determining the amount of damages, if any, which the plaintiff ought to recover in this case, if any, the jury have a right to and should take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's damages, if any, resulting from the accident in question, if any, so far as the same are shown by the evidence, her pain and suffering in body, if any, resulting from such personal injuries, if any, the loss of time or earnings of plaintiff, if any, occasioned by the injury; the money she has necessarily expended or become liable to expend, if any, in endeavoring to be cured of such injuries; the work she was engaged in, if any, at the time of the accident in question; the extent and duration of the injury, if any, as shown by the evidence; her permanent injuries, if any, as shown by the evidence; her

introduced by defendant shows the envelope cover to be in a slightly
on what appears to be a thickly settled city street.
Defendant insists that because plaintiff testified that she
had walked around this particular manhole cover before, and was
familiar with it, that she was not in the exercise of ordinary care
for her safety, because she did not take sufficient pains to avoid
it at the time and place in question. She testified that the acci-
dent happened at 8 o'clock of the evening of June 13th, 1932, and
we are not prepared to say that the jury was wrong when they
determined that she was in the exercise of reasonable care for her
safety when she stepped into this hole.

In Wicks v. Jones-Hennepin Co., 234 Ill. App. 503, this
court said:

"The law required plaintiff to exercise due care for
her own safety before she would be entitled to recover,
but this did not require that she continuously keep her
eyes down as she walked at her own risk.
We think it clear, under the evidence, that whether plain-
tiff was exercising due care for her own safety and whether
defendant was negligent in failing to keep the manhole
in a proper state of repair were for the jury. And upon a
proper evaluation of the evidence, we think it would be
lost the finding of the jury to plaintiff's favor in both
of these questions is against the manifest weight of the
evidence."

Defendant complains of the following instruction:

"The court instructs the jury that if you find for the
plaintiff and against the defendant in this case, you will
be required to determine the amount of the damages, if any,
which she is entitled to recover in this case. In determining
the amount of damages, if any, which the plaintiff ought to
recover in this case, if any, the jury may take into con-
sideration all the facts and cir-
cumstances as proven by the evidence before them; the nature
and extent of plaintiff's injuries, if any, resulting from
the accident in question, if any, so far as the same are
shown by the evidence, but not including in any way, the loss
resulting from such personal injuries, if any, the loss
of time or earnings of plaintiff, if any, compensation for
injury, the money she has necessarily expended on her
medical expenses, if any, in endeavoring to be cured of
such injuries; the work she was engaged in, if any, at the
time of the accident in question; the extent and duration
of the injury, if any, as shown by the evidence; her
permanent injuries, if any, as shown by the evidence; her

inability to work, if any, on account of such injuries; and the jury may find for her such sum as in the judgment of the jury under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained, if any, so far as such damages and injuries are claimed in the declaration and proven by a preponderance of the evidence. (Given)"

An examination of the cases cited by defendant as authority for its contention that the court was in error in giving this instruction, convinces us that defendant's counsel have misinterpreted these cases. We are also of the opinion that defendant was properly served with notice as required by law, that the jury was fully and fairly instructed, and that the verdict is not contrary to the manifest weight of the evidence. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

and in times one claimed in the collection and proved by
evidence of the witnesses. (Affirmative)

in examination of the same given by defendant as authority for the contention that the court was in error in giving this instruction. Defendant in this connection has introduced no evidence. He is also of the opinion that defendant was properly warned again before he testified in that the jury was fairly and fully instructed, and that the verdict is not contrary to the manifest weight of the evidence. Therefore, the judgment is affirmed.

CONFIDENTIAL

* * * * *

37469

ELMER A. TRIEBULL,

(Plaintiff) Appellee,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 1.A. 643⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant in a suit upon a life insurance policy issued by defendant in favor of plaintiff. The trial was by jury, and the verdict was in favor of plaintiff. The judgment entered upon the verdict was for \$183.00. The policy provides that:

"If after the first premium or regular instalment thereof shall have been paid hereunder and under the policy, the insured prior to the anniversary of the policy nearest his sixtieth birthday shall become wholly and permanently disabled by bodily injury or disease sustained or contracted after the date hereof, so that thereby he will be wholly, continuously and permanently prevented from the pursuit of any form of mental or manual labor for compensation, gain or profit whatsoever, the, if there is no premium in default, and the policy is not being continued as paid-up or extended insurance under the non-forfeiture provisions thereof, the Company will upon receipt of due proof of such disability, grant the following benefits subject to the terms and conditions herein set forth.

Beginning with the anniversary of the policy next succeeding the commencement of such disability, the Company will waive the payment of further premiums, during the continuance of the disability, and will pay to the Insured, from the date of the commencement of such disability, or to the beneficiary if disability results from insanity, subject to the conditions and limitations of this provision, with the written consent of the assignee, if any, a sum equal to one per centum of the face amount of the policy exclusive of any policy additions, and a like sum monthly thereafter during the continuance of the disability, until the maturity of the policy."

It is alleged by plaintiff that after the issuance of the policy, and beginning with the 8th day of July, 1932, while the policy was in full force and effect, the plaintiff was, and still is, and henceforth during the remainder of his life, will continue

JAMES A. TRIMBLE,

(Plaintiff) vs.

METROPOLITAN LIFE

OF CHICAGO,

JOHN HANCOCK MUTUAL LIFE INSURANCE

(Defendant)

279 I.A. 643

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant in a suit upon a life

insurance policy issued by defendant in favor of plaintiff. The

trial was by jury, and the verdict was in favor of plaintiff. The

judgment entered upon the verdict was for \$123.00. The policy

provided that:

"If after the first payment or regular installment
payment shall have been paid hereunder and under the policy,
the insured prior to the anniversary of the policy nearest
his birthday shall become totally and permanently
disabled by bodily injury or disease sustained or contracted
after the date of issue, so that he will be totally
continuously and permanently prevented from the pursuit of
any form of mental or manual labor for compensation, gain
or profit whatever, then, if there is no provision in the policy
and the policy is not being continued as paid-up or extended
insurance under the non-forfeiture provisions thereof, the
company will upon receipt of one year of such disability,
grant the following benefits and pay to the person and
conditions herein set forth.

Beginning with the anniversary of the policy next
succeeding the commencement of such disability, the company
will waive the payment of further premiums, during the
continuance of the disability, and will pay to the insured,
from the date of the commencement of such disability, or to the
beneficiary if disability results from death, the sum of \$100
per month, and a like sum monthly thereafter during
the continuance of the disability, until the maturity of the
policy.

It is alleged by plaintiff that after the issuance of

the policy, and beginning with the 6th day of July, 1932, while the

policy was in full force and effect, the plaintiff was, and still

is, and has been during the continuance of his life, still continuing

to be totally, permanently and continuously disabled by bodily injury or disease before attaining the age of sixty years, so he will be unable to perform or engage in any occupation whatever for remuneration or profit; that on September 8th, 1932, written notice of such total disability was given on behalf of the plaintiff to the defendant, but notwithstanding such permanent and continuous disability, defendant has denied liability and refuses to pay. Defendant insists that plaintiff cannot recover unless it is shown that plaintiff cannot perform "any form of mental or manual labor *** whatsoever".

No brief is filed by plaintiff, and the question involved here is, whether or not, ^{it is proved that} plaintiff was totally, permanently and continuously disabled by bodily injury or disease before attaining the age of sixty years, so he will be unable to perform or engage in any form of labor whatever for remuneration or profit.

Plaintiff testified in substance that on July 8th, 1932, he was engaged as a laborer in a brickyard; that his work was tossing bricks, and that on that day he suffered an injury; that shortly thereafter he was taken to a hospital; that he could not walk at the time, and that while in the hospital one Dr. Sprafka put him in an adhesive cast; that he stayed in the hospital from Tuesday of one week until Saturday of the same week, and that he saw this doctor every day; that all the time he was in pain; that after he left the hospital he stayed in bed at home; that about September 8th, 1932, he made a report of his condition to the insurance company; that he paid all of his premiums on his insurance policy; that he was informed that he was not entitled to compensation, according to his policy; that the agent of the insurance company sent him to see a Dr. Albers, at 1 N. La Salle Street, Chicago, in the office of the defendant company; that at that time, the witness was in pain all the time and could not bend down to lift anything; that he could bend down, but that it was

to be totally, permanently and continuously disabled by bodily injury or disease before attaining the age of sixty years, so he will be unable to perform or engage in any occupation whatever for remuneration or profit; that on September 8th, 1935, written notice of such total disability was given on behalf of the plaintiff to the defendant, but notwithstanding such permanent and continuous disability, defendant has denied liability and refuses to pay. Defendant insists that plaintiff cannot recover unless it is shown that plaintiff cannot perform "any form of mental or manual labor *** whatsoever".

We tried as filed by plaintiff, and the question presented here is, whether or not plaintiff was totally, permanently and continuously disabled by bodily injury or disease before attaining the age of sixty years, so he will be unable to perform or engage in any form of labor whatever for remuneration or profit.

Plaintiff testified in substance that on July 8th, 1935, he was engaged as a laborer in a brickyard; that his work was tiring, and that on that day he suffered an injury; that shortly thereafter he was taken to a hospital; that he could not walk at the time, and that while in the hospital one Dr. Spaulding put him in an adhesive cast; that he stayed in the hospital from Tuesday of one week until Saturday of the same week, and that he saw this doctor every day; that all the time he was in pain; that after he left the hospital he stayed in bed at home; that about September 8th, 1935, he made a report of his condition to the insurance company; that he told all of his premiums on his insurance policy; that he was informed that he was not entitled to compensation, according to his policy; that the agent of the insurance company sent him to see a Dr. Albare, at 1 N. La Salle Street, Chicago, in the office of the defendant company; that at that time, the witness was in pain all the time and could not bend down to lift anything; that he could not sleep, but that at no

painful; that in May, 1933, he was sent to a Dr. Kreuscher, representing the insurance company, and that this doctor examined him; that the witness was in pain at that time, and that he stayed in bed for four days after the examination; that when the doctor examined him, every time he touched a certain spot on the body of the witness, he felt great pain. The witness testified that while he is able to walk around, that he is unable to lift anything from the floor because of the pain in his back; that he can bend a little, but that it is very painful; that he cannot sleep at night, and that he wakes up during the night suffering from pain; that he is now wearing a sacroiliac belt, which he has worn for almost a year, and that the belt was given to him by the doctor when the tape was taken off.

Dr. Sprafka, who attended the plaintiff after the alleged injury, testified in substance that he had known the plaintiff since July, 1932, when plaintiff came to St. Anthony's Hospital. He described plaintiff's symptoms in some detail, and stated that up to September, 1933, he had examined plaintiff about sixty times; that after plaintiff left the hospital he was suffering from stiffness of the muscles, and pain and limited motion and stiffness of the joint. This doctor testified that in his opinion, the condition of the plaintiff was permanent, and that he was suffering from chronic Arthritis, and that the chronic Arthritis which he found to exist was, in his opinion, permanent, and that the plaintiff had a permanent limitation in the motion of his legs and in his ability to stand erect.

Dr. Kreuscher, a witness for defendant, testified that he examined the plaintiff in May, 1933, at which time plaintiff told this witness of his injury; that at this examination the witness asked the plaintiff to go through certain motions of bending, and that in each instance defendant complained of pain; that this was ten months after the accident. This doctor stated that he could determine no limitation of motion, and that there was no rigidity of his muscles

plaintiff; that in May, 1932, he was sent to a Dr. Krenschner, representing the insurance company, and that this doctor examined him; that the witness was in pain at that time, and that he stayed in bed for four days after the examination; that when the doctor examined him, every time he touched a certain spot on the body of the witness, he felt great pain. The witness testified that while he is able to walk around, that he is unable to lift anything from the floor because of the pain in his back; that he can bend a little, but that it is very painful; that he cannot sleep at night, and that he wakes up during the night suffering from pain; that he is now wearing a sacroiliac belt, which he has worn for almost a year, and that the belt was given to him by the doctor when the tape was taken off.

Dr. Sprinkle, who attended the plaintiff after the alleged injury, testified in substance that he had known the plaintiff since July, 1932, when plaintiff came to St. Anthony's Hospital. He described plaintiff's symptoms in some detail, and stated that up to September, 1932, he had examined plaintiff about sixty times; that after plaintiff left the hospital he was suffering from stiffness of the muscles, and pain and limited motion and stiffness of the joints. This doctor testified that in his opinion, the condition of the plaintiff was permanent, and that he was suffering from chronic arthritis, and that the chronic arthritis which he found to exist was, in his opinion, permanent, and that the plaintiff had a permanent limitation in the motion of his legs and in his ability to stand erect.

Dr. Krenschner, a witness for defendant, testified that he examined the plaintiff in May, 1932, at which time plaintiff told him of his injury; that at this examination the witness asked the plaintiff to go through certain motions of bending, and that in each instance defendant complained of pain; that this was ten months after the accident. This doctor stated that he could determine no limitation of motion, and that there was no rigidity of his muscles

when plaintiff was bending forward or backward. This doctor gave his opinion that any condition which he found in the patient was not permanent.

Dr. Albers, a witness for the defendant, testified that he had examined the plaintiff on numerous occasions. He was asked the following question and gave the following answer:

"Q. Have you an opinion from your examination of this patient whether or not the condition complained of would be permanent?

A. I have an opinion. He was not disabled. I made a report of my examination."

Referring again to the policy, which provides that the indemnity provided for shall be paid when the insured is "wholly, continuously and permanently prevented from the pursuit of any form of mental or manual labor for compensation, gain or profit whatsoever", it is to be noted that the application for this policy, signed by the insured and attached to and made a part of the policy, shows that plaintiff's avocation at the time of its issuance, was that of "brick tosser", a form of common manual labor. His very avocation suggests the thought that it could not have been anticipated by either of the parties that plaintiff could or would engage in any form of "mental *** labor" for compensation. A fair construction of the policy leads us to conclude that it refers to the character of labor in which the insured had been engaged, that is, manual labor.

In Grand Lodge B. of L. F. v. Orrell, 206 Ill. 308, compensation was provided in case a member "shall be totally and permanently incapacitated from performing manual labor". In that case, the court gave the following instruction to the jury which on appeal was complained of by the insurance company:

"The term 'manual labor,' in its ordinary and usual meaning and acceptation, means labor performed by and with the hands or hand, and it implies the ability for such

when plaintiff was admitted to hospital. This matter was his opinion that any condition which he found in the patient was not permanent.

Dr. Albare, a witness for the defendant, testified that he had examined the plaintiff on numerous occasions. He was asked the following question and gave the following answer:

Q. Have you an opinion from your examination of this patient whether or not the condition complained of would be permanent?

A. I have an opinion. He was not disabled. I made a report of my examination.

Referring again to the policy, which provided that the indemnity provided for shall be paid when the insured is "wholly,

continuously and permanently prevented from the pursuit of any form of mental or manual labor for compensation, gain or profit whatsoever," it is to be noted that the application for this policy,

signed by the insured and attached to and made a part of the policy, shows that plaintiff's occupation at the time of its issuance, was

that of "brick layer", a term of common manual labor. His very occupation suggests the thought that it could not have been anything

other than that of the ordinary brick layer. It would be wrong to say that the policy was issued for the purpose of insuring him against

loss of the policy leads us to conclude that it refers to the ordinary of labor in which the insured was then engaged, and is

not a term of "mental" or "manual" labor. A fair construction of the policy leads us to conclude that it refers to the

occupation and provided in case a member "shall be totally and permanently incapacitated from performing manual labor." It is

true, the court gave the following instruction to the jury when the case was submitted to it for its decision:

"The term 'manual labor' is the ordinary and usual meaning and construction, manual labor performed by and with the hands or arms, and it implies the ability for such

sustained exercise and use of the hands or hand at labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor, does not constitute the ability to perform manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied on in this action."

In that case, in passing upon this instruction, and plaintiff's right to recover, the Supreme Court said:

"Counsel for appellant *** insist that the phrase 'total incapacity' means absolute and complete inability to perform any labor whatever with the hand or hands, and the criticism upon the instruction is, that it erroneously advised the jury that the appellee may be regarded as totally incapacitated though he be not absolutely incapacitated to use his hand or hands in some manner of useful labor. The construction given by the instruction is proper. A condition of absolute and complete incapacity to do any manual labor ought not to be regarded as the true construction of the language of the by-law. Total inability to perform manual labor to an extent necessary to entitle him to receive earnings is what is meant. One who has power to use his hand or hands at labor for a brief effort only, and who is lacking in power to sustain the effort for a sufficient length of time to make the result thereof of any benefit to him in the way of assisting in his support, is for all practical purposes and in every actual sense totally incapacitated from performing manual labor."

In the instant case, in connection with the construction of the language of the policy, and defendant's insistence that under its terms plaintiff is not entitled to recover, defendant complains of an instruction given to the jury on behalf of plaintiff. ~~because~~ it refers to "his form of labor." The instruction reads as follows:

"If you believe from the evidence the plaintiff is and has been totally and permanently disabled continuously from the pursuit of his form of labor as alleged in the policy, by a preponderance or greater weight of the evidence, and he is unable, because of such total and permanent disability, to gain or earn any profit from said occupation and that no premiums are in default, then your verdict should be for plaintiff."

"His form of labor" means the character of labor which plaintiff was

undoubtedly involves the use of the hands or hand at labor as all kinds of labor require the use of the hands, and being able to temporarily use the hands or hand at some kind of labor, but without the ability to sustain such ordinary kind of work and use of the hands at some mental labor whereby money may be earned is substantially equal in earning a living to some kind of manual labor, does not constitute the ability to perform manual labor as it must be understood and contrasted by the nature of the industry contrasted upon and relied on in this action."

In that case, in passing upon this instruction, and Plaintiff's right to recover, the Supreme Court said:

"Counsel for appellant *** insist that the phrase 'total inability' means absolute and complete inability to perform any labor whatever with the hands or hands, and the evidence shows that the instruction as given is erroneous. It is true that the phrase may be regarded as covering inability to sustain such ordinary kind of work and use of the hands at some mental labor whereby money may be earned, though he be not absolutely incapacitated to use his hands or hands in some manner of manual labor. The instruction given by the instruction is proper. A condition of absolute and complete inability to do any manual labor ought not to be regarded as the true construction of the language of the by-law. Total inability to perform manual labor to an extent necessary to enable him to receive earnings is what is meant. The law does not require that he be unable to use his hands or hands for a brief effort only, and his inability to perform to sustain the effort for a sufficient length of time to make the receipt of any benefit to him in the way of assistance in his support, is not all that is required. It is only when the evidence is such as to show that the plaintiff is totally incapable of performing manual labor."

In the instant case, in connection with the construction of the language of the by-law, and defendant's instruction that under the terms of the by-law it was required to support, defendant's instruction of no instruction given to the jury as to the meaning of the by-law. It is true that the instruction reads as follows:

"If you believe from the evidence the plaintiff is and has been totally and permanently disabled from sustaining himself from the date of his injury to the date of his death, and he is a permanent and total and permanent disability, and he is unable to sustain himself from the date of his injury to the date of his death, then your verdict should be for the plaintiff."

"The term of labor" means the power of labor which is the right

performing when the policy was issued, as shown by the application - a part of the policy. We are of the opinion that the court was not in error in giving this instruction.

From the testimony of the plaintiff, together with that of his attending physician, Dr. Sprafka, and the other testimony in the case, we are of the opinion that the jury could reasonably arrive at the verdict which they did, and that we are not justified in disturbing it. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

performing when the policy was issued, as shown in the application -
a part of the policy. It was of the opinion that the agent was not
in error in taking this investigation.

From the testimony of the plaintiff, together with that
of his attending physician, Dr. Hawley, and the other testimony
in the case, we are of the opinion that the jury would reasonably
arrive at the verdict which they did, and that we are not justified
in disturbing it. Therefore, the judgment is affirmed.

AFFIRMED.

WILLIAM T. VAN FLETER, J. CLERK.

37499

JASPER A. CAMPBELL, JR., MASON B. STARRING, JR., EARLE E. BEYER, EDWARD WALKER HARDEN, HARRY E. BENEDICT, and FRANK A. VANDERLIP, a Copartnership, doing business under the name of CAMPBELL STARRING & CO.,

Plaintiffs and Appellants,

v.

I. S. FALK and W. F. HEWITT,

Defendants and Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 644¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of the Municipal Court of Chicago for \$5,650.00 against them, entered on January 5th, 1934, on defendants' claim of set-off. The cause was submitted to a jury. The court directed that the jury return a verdict against plaintiffs on their claim to which the set-off of defendants was filed. The verdict for defendants was for \$5,650.00.

On January 17th, 1931, plaintiffs brought suit in the Municipal Court of Chicago against the defendants for the recovery of \$673.00 for an alleged balance due plaintiffs as brokers, such claim arising out of stock transactions on the New York Stock Exchange, in which plaintiffs are alleged to have acted as brokers for defendants. Both of the defendants were served with summons, defendant Hewitt appeared by his attorneys, and on January 27th, 1931, a default judgment was entered against defendant Falk for the sum of \$673.00. Thereafter, defendant Hewitt filed an affidavit of merits in and by which he denied that he was indebted to plaintiffs. On May 11th, 1932, defendant Falk entered a motion to vacate the judgment against him, and in the affidavit accompanying the motion, alleged that he was not indebted to the plaintiffs in any amount. On June 13th, 1932, an order was entered vacating the judgment against Falk, who then filed an affidavit of merits denying liability, and

in which he set up his alleged defense to plaintiff's claim. On April 14th, 1933, an order was entered in the Municipal Court of Chicago, transferring the cause from the fourth^{to} the first class, and on May 1st, 1933, more than two years after the suit was started, defendants were given leave to file an amended affidavit of merits and a set-off-upon payment of additional fees, as provided by statute. On the same day, defendants filed an affidavit of merits and^a set-off, in which they again denied that they were indebted to plaintiffs, and in addition alleged that certain moneys and stocks were deposited with plaintiffs for gambling purposes, that the whole of their transactions with the plaintiffs were gambling transactions under the statute of the state of New York, where the dealings were had, and that by the terms of the New York statute, they were and are entitled to recover from plaintiffs all the money deposited by defendants with plaintiffs, and asserting that plaintiffs are indebted to them in the sum of \$19,000.00. Plaintiffs deny that any of the transactions conducted by them were gambling transactions, but insist that all of the deals made by them for defendants were legitimate purchases and sales of stocks and securities.

Plaintiffs ^{were} ~~are~~ licensed stock brokers in the city of New York and state of New York, and defendants ~~were and are~~ residents of Chicago, Illinois. *(had been)*

Plaintiffs urge that the court was in error in transferring the cause from the fourth ~~to~~ the first class, and in allowing the set-off to be filed.

By an Act of the General Assembly, approved July 8th, 1931, and adopted November 8th, 1932, an act entitled "An Act in relation to the Municipal Court of the city of Chicago" was amended. The portion of the amended act applicable to the case at bar, is as follows: (Smith Hurd Revised Statutes 1933, Chapter 37, Sec. 6, p.960)

in which he set up his alleged defense to Plaintiff's claim. On April 14th, 1933, an order was entered in the Municipal Court of Chicago, transferring the cause from the fourth to the first class, and on May 1st, 1933, more than two years after the suit was started, defendants were given leave to file an amended affidavit of merits and a set-off upon payment of additional fees, as provided by statute. On the same day, defendants filed an affidavit of merits and set-off, in which they again denied that they were indebted to plaintiffs, and in addition alleged that certain moneys and stocks were deposited with plaintiffs for gambling purposes, that the whole of their transactions with the plaintiffs were gambling transactions under the statute of the state of New York, where the dealings were had, and that by the terms of the New York statute, they were and are entitled to recover from plaintiffs all the money deposited by defendants with plaintiffs, and asserting that plaintiffs are indebted to them in the sum of \$10,000.00. Plaintiffs deny that any of the transactions conducted by them were gambling transactions, but insist that all of the deals made by them for defendants were legitimate purchases and sales of stocks and securities.

Plaintiffs also demand stock brokers in the city of New York and state of New York, and defendants were and are residents of Chicago, Illinois.

Plaintiffs urge that the court was in error in transferring the cause from the fourth to the first class, and in allowing the set-off to be filed.

By an act of the General Assembly, approved July 2nd, 1931, and signed November 8th, 1932, an act entitled "An Act in relation to the Municipal Court of the City of Chicago" was amended. The portion of the amended act applicable to the case at bar, is as follows: (Smith With Revised Statutes 1933, Chapter 37, Sec. 8, p. 350)

"A case commenced as one of the first class may be changed to one of the fourth class, or a case commenced as one of the fourth class may be changed to one of the first class, upon such terms as to costs and notice to the parties as may be provided for by the rules of the court. In a case of the fourth class the defendant may file a set-off or counterclaim of the first class, in which case he shall pay to the clerk, upon entering his appearance, or upon his filing such set-off or counterclaim, the same fees required to be paid by a defendant in a case of the first class, and thereafter such case shall be classified and disposed of as one of the first class. (As amended by act approved July 8, 1931. L. 1931, p. 420, Adopted Nov. 8, 1932.)"

It is insisted by plaintiffs, however, that this amendment is not applicable to a cause pending at the time of the passage of the act.

In Superior Coal Co. v. Industrial Commission, 321 Ill. 240, the court said:

"In the case of Otis Elevator Co. v. Industrial Com. 302 Ill. 90, this court held that where a statute confers a vested right such right cannot afterward be altered or amended so as to destroy it, but if a change in the law affects only the remedy or procedure all rights of action are governed thereby, without regard to whether they accrued before or after such change and without regard to whether suit had previously been instituted or not, unless there is a saving clause as to the existing litigation."

We are of the opinion that this Act has to do with procedure only, that no vested rights are affected thereby, that the court was not in error in transferring this cause from the fourth to the first class, and in allowing defendants to file their set-off.

In their claim of set-off, after alleging that defendants had turned certain moneys and stocks over to the plaintiffs, defendants allege the following: "that said sum was deposited with the plaintiffs by the defendants with the mutual understanding and intention that the said sum was to be used in speculating and wagering and the rise and fall of the prices of stocks, bonds and other securities listed on the New York Stock Exchange and other exchanges of the United States. Defendants allege that thereafter plaintiffs reported to the defendants numerous purchases and sales of stock, bonds and other securities, but that said purported purchases and

"A case commenced in one of the first class may be changed to one of the fourth class, or a case commenced in one of the fourth class may be changed to one of the first class, upon such terms as to costs and notice to the parties as may be provided for by the rules of the court. In a case of the fourth class the defendant may file a set-off or counterclaim of the first class, in which case he shall pay to the clerk, upon entering his appearance, or upon his filing such set-off or counterclaim, the same fees required as are paid by a defendant in a case of the first class, and thereafter such case shall be classified and disposed of as one of the first class. (It is provided that such set-off or counterclaim shall be filed within 10 days after the filing of the answer.)"

It is insisted by plaintiffs, however, that this amendment is not applicable to a cause pending at the time of the passage of the act.

In Plaintiff's Reply to Defendant's Motion, Vol. III.

100, the court said:

"In the case of Wells Fargo & Co. v. Industrial Co., 202 Ill. 50, this court held that where a judgment was rendered right and right cannot afterward be altered or amended as to the facts, but if a change in the law occurs only the remedy or remedy will change or action are governed thereby, without regard to whether they occurred before or after such change and should regard to whether they had previously been instituted or not, unless there is a saving clause as to the existing litigation."

We are of the opinion that this act has to do with procedure only, that no vested rights are affected thereby, that the court was not

in error in transferring this cause from the fourth to the first

class, and in allowing defendants to file their set-off.

In their claim of set-off, after alleging that defendants

had turned certain moneys and stocks over to the plaintiffs, defendants

allege the following: "that said sum was deposited with the

plaintiffs by the defendants with the mutual understanding and

intention that the said sum was to be used in purchasing and paying

for the said sum and bill of the various of stocks, bonds and other

securities listed on the New York Stock Exchange and other exchanges

of the United States. Defendants allege that plaintiffs' complaint

is based on the balance numerous purchases and sales of stocks,

bonds and other securities, but that said purchases and sales were

sales were not made by the plaintiffs, but that said reports were made pursuant to the aforesaid understanding between the plaintiffs and defendants to speculate and wager upon the aforesaid rise and fall of the prices of stocks, bonds and other securities. Defendants further allege that the aforesaid agreements and understandings and the aforesaid purported purchases and sales were made and entered into in the State of New York".

As stated, it is the contention of defendants that all of the transactions with plaintiffs were gambling transactions. They insist that under the statutes of the State of New York, they are entitled to recover from plaintiffs the amounts of money deposited with them, and in support of such contention, and as a part of their claim of set-off, they set out a portion of the statutes of the State of New York as follows:

"Any person, copartnership, firm, association or corporation, whether acting in his, their or its own right, or as the officer, agent, servant, correspondent or representative of another, who shall,

1. Make or offer to make, or assist in making or offering to make any contract respecting the purchase or sale, either upon credit or margin, of any securities or commodities, including all evidences of debt or property and options for the purchase thereof, shares in any corporation or association, bonds, coupons, script, rights, choses in action and other evidence of debt or property and options for the purchase thereof or anything movable that is bought and sold, intending that such contract shall be terminated, closed or settled according to, or upon the basis of the public market quotations of or prices made on any board of trade or exchange or market upon which such commodities or securities are dealt in, and without intending a bona fide purchase or sale of the same; or

2. Makes or offers to make or assists in making or offering to make any contract respecting the purchase or sale, either upon credit or margin, of any such securities or commodities intending that such contract shall be deemed terminated, closed and settled when such market quotations of or such prices for such securities or commodities named in such contract shall reach a certain figure without intending a bona fide purchase or sale of the same; or

3. Makes or offers to make, or assists in making or offering to make any contract respecting the purchase or sale, either upon credit or margin of any such securities or com-

into in the State of New York.

As stated, it is the contention of defendants that all of the transactions with plaintiffs were gambling transactions. They insist that under the statutes of the State of New York, they are entitled to recover from plaintiffs the amounts of money deposited with them, and in support of such contention, and as a part of their claim of set-off, they set out a portion of the statutes of the State of New York as follows:

[illegible]

modities, not intending the actual bona fide receipt or delivery of any such securities or commodities, but intending a settlement of such contract based upon the difference in such public market quotations of or such prices at which said securities or commodities are, or are asserted to be, bought or sold; or

4. Shall, as owner, keeper, proprietor or person in charge of, or as officer, director, stockholder, agent, servant, correspondent or representative of such owner, keeper, proprietor or person in charge, or of any other person, keep, conduct or operate any bucket shop, as hereinafter defined; or knowingly permit or allow or induce any person, copartnership, firm, association or corporation whether acting in his, their or its own right, or as the officer, agent, servant, correspondent or representative of another to make or offer to make therein, or to assist in making therein, or in offering to make therein, any of the contracts specified in any of the three preceding subdivisions of this section,

Shall be guilty of felony and on conviction thereof shall, if a corporation, be punished by a fine of not more than five thousand dollars for each offense and all other persons so convicted shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than five years, or by both such fine and imprisonment. The prosecution, conviction and punishment of a corporation hereunder shall not be deemed to be a prosecution or punishment of any of its officers, directors or stockholders.

All wagers, bets or stakes, made to depend upon any race, or upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful.

All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void.

All things in action, judgments, mortgages, conveyances and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the repaying any money knowingly lent or advanced for the purpose of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinafter declared.

When any securities, mortgages, or other conveyances, executed for the whole or part of any consideration specified in the preceding paragraph shall affect any real estate, they shall inure for the sole benefit of such person as would be entitled to the said real estate, if the grantor or person incumbering the same, had died, immediately upon the execution of such instrument, and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, covenants and conveyances, for preventing such real estate from coming to, or devolving upon, the person hereby

intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be deemed fraudulent and void.

Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not."

The position of defendants whose right to recover on their set-off is the issue here, as stated in their brief, is that "while the burden of proof as to the issue of gambling is on the defendants, the burden of proof as to the actual purchases and sales of stocks is, and remains throughout this case, on the plaintiffs", and that ***"plaintiffs have not produced one person who ever executed one of the trades involved in this case ***. Not one of the witnesses produced by the plaintiffs ever received or delivered one share of stock mentioned in the accounts rendered to the defendants. The plaintiffs did not even produce their receipt and delivery blotters, which they asserted existed. Under such circumstances, plaintiffs have not discharged the burden of proof placed upon them of showing that the stocks alleged to have been purchased for the defendants' account were actually so purchased."

In the trial, the following stipulation was offered by plaintiffs and received in evidence:

"It Is Stipulated by and between the plaintiffs and defendants, through their respective attorneys:

1. That the defendants opened an account with Campbell Starring & Co. on April 10th, 1928; the first transaction in the said account was the transfer and delivery to Campbell Starring & Co. from the account of I. S. Falk with Russell, Brewster & Co., through Clark, Dodge & Co. of New York, of 100 shares of Johns-Manville stock, for which Campbell Starring & Co. paid to Clark, Dodge & Co. a debit balance of \$8,346.23.

2. That on April 10th, 1928, the defendants also deposited with Campbell Starring & Co. the sum of \$3,000 by check.

known to any of the same as aforesaid, or in any way
interested in or having the same, so as to prevent
him from doing so, and he is not to be held liable
for any such transaction.

Any person who shall pay, deliver or deposit any
money, property or thing in value, upon the order of any
person or persons, who are not and never were
of the winner or person to whom the same shall be paid or
delivered, and of the stakeholder or other person in whose
favor the same shall be deposited any such money, property
or thing, whether the same shall have been paid over
or not, and whether any such money be
lost or not."

The position of defendants whose right to recover on their
part is the same here, as stated in their brief, is that "the
burden of proof as to the issue of gambling is on the defendants,
the burden of proof as to the actual purchases and sales of stocks
is, and remains throughout this case, on the plaintiffs", and that
"plaintiffs have not sustained the burden of proof as to the
issue of the same involved in this case". Not one of the witnesses
produced by the plaintiffs ever received or delivered one share of
stock mentioned in the accounts rendered to the defendants. The
plaintiffs did not even produce their receipts and delivery slips,
which they claimed existed. Under such circumstances, plaintiffs
have not discharged the burden of proof placed upon them of showing
that the stock alleged to have been purchased for the defendants
account was actually so purchased."

In the trial, the following stipulation was offered by
plaintiffs and received in evidence:
"It is stipulated by and between the plaintiffs and
defendants, through their respective attorneys:
1. That the defendants opened an account with
Standard & Co. on April 10th, 1923; the first transaction
in the said account was the purchase and delivery to
Standard & Co. of the amount of \$100,000.00 New York
100 shares of John-John stock, for which Campbell
Standard & Co. paid to J. J. & Co. a debit balance
of \$100,000.00.
2. That on April 10th, 1923, the defendants also
deposited with Campbell Standard & Co. the sum of \$2,000
by check.

3. That on April 14th, 1928, the defendants caused to be transferred and delivered from the account of W. F. Hewitt at A. O. Slaughter & Co., in Chicago, through Laidlaw & Co., in New York, 50 shares of Johns-Manville stock, to Campbell Starring & Co., and the said account of defendants was credited with the said stock, and Campbell Starring & Co. paid to Laidlaw & Co. a debit balance thereon of \$3,861.39.

4. That as the result of these transactions, Campbell Starring & Co. had on hand and to the credit of said account, on April 14th, 1928, 150 shares of Johns-Manville stock, subject to a debit balance of \$9,007.62.

5. That on April 23rd, 1928, Campbell Starring & Co. sold for account of the defendants 50 of the 150 shares of Johns-Manville stock in the said account at the price of \$123-1/4 per share, and received from the purchase thereof the sum of \$6,148.00, which sum was credited to defendants' account.

6. That the joint account agreement dated June 11th, 1929, on a printed form, headed with the name of 'Campbell Starring & Co.', marked in evidence in the deposition heretofore taken as 'Plaintiffs' Exhibit 1 for Identification', bears the true and genuine signatures of I. S. Falk and W. F. Hewitt.

7. That the paper introduced in evidence at the taking of the prior deposition as 'Plaintiffs' Exhibit 2 for Identification' upon the printed form headed 'Campbell Starring & Co.' and designated as 'Trading Authorization' etc., and dated June 26th, 1929, bears the true and genuine signature of I. S. Falk.

8. That the paper introduced in evidence upon the taking of the prior deposition as 'Plaintiffs' Exhibit 3' and dated September 30th, 1929, a form letter addressed to I. S. Falk and W. F. Hewitt, relating to their account with Campbell, Starring & Co., bears the true and genuine signature of I. S. Falk.

9. That a letter dated April 7th, 1928, signed by I. S. Falk and W. F. Hewitt, and addressed to Mr. Jasper Campbell of Campbell Starring & Co., 111 Broadway, New York City, be deemed in evidence without any objection by either party.

10. Subject to the objection of the plaintiffs as to its materiality, relevancy and competency, that the annexed schedule containing the market prices of Columbia Graphophone between September 21st and October 15th, 1929, both inclusive, shows the true and correct market prices of said stock on the date therein set forth.

11. The statements of account annexed here with and marked Exs. 50 to 71 inclusive are statements sent by the plaintiffs and received by the defendants during the first part of the month following the month in which the transactions indicated on said statements are alleged to have taken place, and may be offered in evidence without any further foundation subject to the objection by the defendants only for materiality, relevancy and competency.

Dated New York, October 23rd, 1933."

Jasper A. Campbell, a member of the firm of Campbell Starring & Co., whose depositions was taken in New York, testified

3. That on April 14th, 1935, the defendants caused to be investigated and returned from the account of J. J. Heston at A. C. Heston & Co., in Chicago, Illinois, a check for \$100.00, in the name of John Heston, to Campbell, Heston & Co., and the said account of Heston was credited with the said check, and Campbell, Heston & Co., also is listed as a bank balance sheet of \$1,000.00.

4. That on the basis of these transactions, Campbell, Heston & Co., and on June 1st, 1935, the balance sheet of John Heston, on April 14th, 1935, 150 shares of John Heston, was subject to a debit balance of \$1,000.00.

5. That on April 14th, 1935, Campbell, Heston & Co., sold for account of the defendant 50 of the 150 shares of John Heston stock in the said account at the price of \$20.00 per share, and received from the Heston Company, the sum of \$1,000.00, which was credited to defendant's account.

6. That the joint account agreement dated June 1st, 1935, on a printed form, headed with the name of 'Campbell, Heston & Co.', was in evidence in the deposition taken before me at 'Minneapolis, Minnesota' for investigation, bears the true and genuine signature of J. J. Heston and J. J. Heston.

7. That the same is introduced in evidence at the taking of the deposition as 'Exhibit A' and 'Exhibit B' for identification, upon the printed form headed 'Campbell, Heston & Co.', and designated as 'Trading Authorization', etc., and dated June 1st, 1935, bears the true and genuine signature of J. J. Heston.

8. That the same is introduced in evidence upon the taking of the deposition as 'Exhibit C' and 'Exhibit D', and dated September 10th, 1935, a true and correct copy of the same, bearing the true and genuine signature of J. J. Heston, is also introduced in evidence.

9. That a letter dated April 14th, 1935, signed by J. J. Heston and J. J. Heston, and addressed to Mr. J. J. Heston of Campbell, Heston & Co., 111 Broadway, New York City, is introduced in evidence as a copy of the letter, and is so designated in the caption of the exhibits as to its authenticity, competency and competency, that the annexed exhibits containing the same, copies of Columbia University, between September 1st and October 1st, 1935, bear the true and correct prices of said stock and the date therein set forth.

10. The statements of account annexed herewith and marked as 'Exhibit E' and 'Exhibit F' are introduced by the defendant and received by the defendant during the taking of the deposition as a copy of the same, and are so designated in the caption of the exhibits as to their authenticity, competency and competency, that the annexed exhibits containing the same, copies of Columbia University, between September 1st and October 1st, 1935, bear the true and correct prices of said stock and the date therein set forth.

11. The statements of account annexed herewith and marked as 'Exhibit G' and 'Exhibit H' are introduced by the defendant and received by the defendant during the taking of the deposition as a copy of the same, and are so designated in the caption of the exhibits as to their authenticity, competency and competency, that the annexed exhibits containing the same, copies of Columbia University, between September 1st and October 1st, 1935, bear the true and correct prices of said stock and the date therein set forth.

that on June 11th, 1929, he received from defendants Hewitt and Falk the following document, which is referred to as a "joint account contract", and in the stipulation as "Exhibit 1";

"JOINT ACCOUNT

In consideration of your carrying a joint account for the undersigned, we jointly and severally agree to be fully and completely responsible and liable for said account and to pay on demand any debit balance or losses at any time due in this account. Each of us has full power and authority to make purchases and sales, withdraw moneys and securities from it or do anything else with reference to said account, either individually or in our joint names, as either of us may elect, and you are authorized and directed to act upon instructions of any of us.

Any and all notices of purchases or sales or any demand for margin sent to either of us shall be binding upon us both and upon our account.

We jointly and severally agree that you shall have a lien on and may hold as collateral security for said account any and all securities and equities you may hold or have in any account at any time for us or any one of us, and that the assertion or enforcement of any such lien shall not effect or alter the liability of any of us or us all for any debit balance or loss on said account.

This arrangement shall continue until the receipt by you from us of written cancellation thereof.

Dated June 11, '29.

(Signed) W. F. Hewitt

(Signed) I. S. Falk";

He testified that thereafter his firm received from the defendant Falk the following document, referred to in the stipulation as Exhibit 2":

"Messrs. Campbell, Starring & Co.,

Dear Sirs:

I hereby authorize Jasper Campbell, of Campbell, Starring & Co. to buy, sell and trade in, for my account and risk and in my name, stocks, bonds and other securities and/or commodities on margin or otherwise and in accordance with your terms and conditions; and I hereby agree to indemnify and hold you harmless from and to promptly pay you on demand any and all losses arising therefrom or debit-balance due thereon. You will kindly follow his instructions in every respect concerning said account.

I hereby waive notification to me of any of the aforementioned transactions and delivery of any statements, notices or demands pertaining thereto and hereby ratify any and all transactions heretofore or hereafter made by him on or for my account.

that on June 11th, 1939, he received from defendant Hewitt and
took the following document, which is referred to as a "joint account
contract", and in the stipulation as "Exhibit I":

"JOINT ACCOUNT"

In consideration of our carrying a joint account for
the undersigned, we jointly and severally agree to be jointly
and severally responsible and liable for said account and
to pay on demand any debit balance or losses at any time
due in this account. Each of us has full power and author-
ity to make purchases and sales, withdraw money and secur-
itize from it or do anything else with reference to said
account, either individually or in our joint names, as
agent of or as may elect, and you are authorized and directed
to not upon instructions of any of us.
Any and all notices of withdrawal of sales or any demand
for return made to either of us shall be binding upon the
both and upon our account.
We jointly and severally agree that you shall have
lien on and may hold as collateral security for said account
any and all securities and equities you may hold or have
in any account at any time for us or any one of us, and
that the retention or enforcement of any such lien shall
not affect or alter the liability of any of us or us all
for any debit balance or loss on said account.
This agreement shall continue until the receipt by
you from us of written cancellation thereof.

Dated June 11, 1939.

(Signed) W. F. Hewitt

(Signed) I. S. Helm

He testified that thereafter his firm received from the defendant
this the following document, referred to in the stipulation as
"Exhibit II":

"Messrs. Campbell, Ewing & Co.,

New York:

I hereby authorize Messrs. Campbell, Ewing & Co.,
starting a GC. to buy, sell and lease in, for my account and
risk and in my name, stocks, bonds and other securities
and/or commodities on margin or otherwise and in accordance
with your terms and conditions; and I hereby agree to
indemnify and hold you harmless from and to promptly pay
you on demand any and all losses arising therefrom or from
balance due thereon. You will please inform me of the above-
stated in every respect concerning said account.
I hereby give notification to me of any of the above-
mentioned transactions and delivery of any statements,
notices or demand for return of securities and money, and
any and all transactions heretofore or hereafter made by
me on or for my account.

This authorization is a continuing one and shall remain in full force and effect until receipt from me of written notice of my revocation thereof.

Dated June 26, 1929.

(Signed) I. S. Falk"

The letter from defendants to Jasper Campbell dated April 7th, 1928, referred to in the stipulation, is as follows:

"April 7, 1928

Mr. Jasper Campbell,
Campbell, Starring & Co.,
111 Broadway,
New York City

Dear Mr. Campbell:

Mr. Philip S. Platt has advised us that you are agreeable to undertaking personal charge of an account which we may open with Campbell, Starring & Co. We have, at the present time, accounts with brokerage houses on the N. Y. Stock Exchange through their branch offices in Chicago. We shall arrange before 9 A. M. Monday, April 9, 1928, to have these accounts transferred to Campbell, Starring & Co. according to the instructions from Mr. Platt who informs us that your office will be agreeable to such arrangements.

We have instructed:

1. Russell, Brewster and Co. to transfer to you the account of I. S. Falk. This carries 100 shares of Johns Manville 'on hand' and a debit balance of approximately \$8400.

2. A. O. Slaughter and Co. to transfer to you the account of W. F. Hewitt. This carries 50 shares of Johns Manville 'on hand' with a debit balance on March 31, 1928, of \$3654.44.

We should like you to combine these two transferred accounts to a single account to be carried by Campbell Starring and Co. for I. S. Falk and W. F. Hewitt. We are enclosing a cashier's check on the National Bank of Woodlawn, Chicago, for the sum of \$3,000 to be further credited to the account of I. S. Falk - W. F. Hewitt.

Thus, this will give the joint account 150 shares of Johns Manville with a debit balance of about \$9000 and a margin of ownership of about \$10,000, equivalent to more than \$60 per share.

In accordance with the advice of Mr. Platt we are placing this account in your hands, to have your personal supervision and are authorizing you to buy and sell securities for this account at your discretion for the best interests of the account.

The undersigned are equal owners in this joint account and have mutually agreed between them that each may, upon necessary occasion, call for one half the credit or equity in the account.

We do not anticipate that we shall have occasion to make withdrawals from this account for some time, so that in handling it you may be guided by this consideration.

May we on this occasion express to you our thanks for

This authorization is a continuing one and shall remain in full force and effect until receipt from me of written notice of my revocation thereof.

Very truly yours,

(Signed) J. S. Smith

The letter from defendant to Joseph Campbell dated April 27th, 1938, referred to in the stipulation, is as follows:

"April 27, 1938"

Mr. Joseph Campbell,
Campbell, Stewart & Co.,
111 Broadway,
New York City

Dear Mr. Campbell:

Mr. Philip D. Platt has advised us that you are desirous to understand certain shares of an account which we may have with Campbell, Stewart & Co. We have at the present time accounts with brokers' houses on the N. Y. Stock Exchange through their branch office in Chicago. We shall arrange before 9 A. M. Monday, April 27, 1938, to have these accounts transferred to Campbell, Stewart & Co. according to the instructions from Mr. Platt and inform us that your office will be agreeable to such arrangements.

We have instructed:

1. Messrs. Brewster and Co. to transfer to you the account of J. S. Smith. This account has shares of 1000 shares of common stock and a debit balance of approximately \$4400.
2. A. O. Shugart and Co. to transfer to you the account of J. S. Smith. This account has shares of 1000 shares of common stock and a debit balance of \$1000.00.
We would like you to confirm these two transfers to accounts as a single account to be carried by Campbell, Stewart & Co. for J. S. Smith and J. S. Smith. We are enclosing a copy of a check on the National Bank of Chicago, Chicago, for the sum of \$1,000 to be further credited to the account of J. S. Smith.

Thus, this will give the joint account 1500 shares of common stock with a debit balance of about \$5400 and a margin of ownership of about \$10,000, equivalent to what you are placing in accordance with the advice of Mr. Platt we are placing this account in your hands, to have your personal supervision and you authorizing you to buy and sell securities for this account at your discretion for the best interests of the account.
The authorized and usual manner in this joint account and have mutually agreed between them that each may, upon necessary occasion, call the two bills and assets in the account.
We do not anticipate that we shall have occasion to make withdrawals from this account for some time, so that in handling it you may be guided by this consideration.
May we on this occasion express to you our thanks for

the advice you have already given us through Mr. Platt and which we have utilized profitably. It is almost gratuitous to add how much we shall appreciate further profitable investments under your personal guidance.

Yours very truly,

(Signed) I. S. Falk
1151 E. 56th St.,
Chicago, Ill.

(Signed) W. F. Hewitt,
1230 E. 63rd St.,
Chicago, Ill."

Defendant Falk testified, among other things, that, "Prior to April, 1928, I knew Philip Platt. I had known him since 1920 or 1921. He was a friend of mine. He was not acquainted with Dr. Hewitt. Prior to the sending of this letter of April 7th, 1928, I had a conversation with Mr. Platt relative to this opening of an account with Campbell Starring & Co." "Prior to April 7th, 1928, I had an account with Russell Brewster & Co., which is a stock brokerage house in Chicago. I had had that account for a matter of a few months. I think the account was opened in the early autumn of 1927. * * * I met Jasper Campbell on the 8th of June, 1928. I talked with Mr. Campbell on that date in his office in New York. *** No one beside myself and he was present. I introduced myself to him." This witness testified that at this meeting, Mr. Campbell produced a statement of the account that the defendants then had with plaintiffs' firm, and that Campbell made the following statement: "Your account is in very good shape; you got a good safe margin; there is no reason for you to be worried about it, and I can assure you, you won't be called upon to put up any more collateral or any more money at this or any other time, and I will guarantee this account, and I am standing by that, and looking after this. Now, you can sell this account and take your money out, if you want to, that is entirely your privilege." The witness stated that he told Campbell that he would leave the account as it was, and would write to Dr. Hewitt, the other defendant, to do the same. Falk further testified that,

the advice you have already given me through Mr. Platt and I am
very grateful to you. It is almost impossible for me
to know the small amount of money which I have received from
your personal business.

Yours very truly,

(signed) I. S. Lewis
1111 E. 50th St.
Chicago, Ill.

(signed) I. S. Lewis
1111 E. 50th St.
Chicago, Ill.

Witnesses both testified, among other things, that "I
do not, I know Lewis' name. I had known him since 1920 or
1921. He was a friend of mine. He was not acquainted with Mr.
Hewitt. Prior to the sending of this letter of April 7th, 1928, I
had a conversation with Mr. Platt relative to this opening of an
account with Campbell, Lewis & Co., 1111 E. 50th St., Chicago.
I had an account with Campbell, Lewis & Co., which is a stock
brokers house in Chicago. I had had that account for a matter of
a few months. I think the account was opened in the early autumn
of 1927. I set Jasper Campbell on the 8th of June, 1928. I
talked with Mr. Campbell on that date in his office in New York."
He one beside myself and he was present. I introduced myself to him.
This witness testified that at this meeting, Mr. Campbell produced
a statement of the account that the defendants then had with plain-
tiff, and that Campbell made the following statement: "Your
account is in very good shape; you got a good safe margin; there is
no reason for you to be worried about it, and I can assure you, you
won't be called upon to put up any more collateral or any more money
at this or any other time, and I will guarantee this account, and I
am standing by that, and looking after this. Now, you can sell this
account and take your money out, if you want to, that is entirely
your privilege." The witness stated that he told Campbell that he
would leave the account as it was, and would write to Dr. Hewitt,
the other defendant, to do the same. This further testified that

"I never received any stock out of that account. Dr. Hewitt never to my knowledge, received any stock out of that account. I got \$1,000.00 out of that account. That was the latter part of May, 1929. *** Dr. Hewitt did not get anything out of that account, except half of that withdrawal of \$1,000.00."

As to whether defendants received from plaintiffs confirmations of the purchases and sales made by plaintiffs for defendants, this witness stated, "Well, I could not be absolutely sure of the number of these confirmations that I received in the ordinary course of the mails, or that I received these, but I probably did." (Referring to alleged confirmations of sales sent by plaintiffs to defendants, copies of which were exhibited to the witness.) "I received some monthly statements, but I know I did not receive them each month. *** I received some, but I know I did not receive anything like confirmations of all those transactions. The confirmations I did receive, I turned over to my attorney."

It seems that some time after these defendants had opened up their account with plaintiffs, plaintiffs ceased to engage in the brokerage business, and that the account of defendants was turned over to a brokerage firm in New York named Baker, Winans & Harden.

On the part of plaintiffs, the following document was received in evidence:

"I. S. FALK & W. F. HEWITT

Sept. 30, 1929

No. 790

Dear Sir:

Your account with us at the close of Sep. 30, 1929, stands on our books as stated hereunder. For use in connection with their periodical audit of our accounts now in progress,

"I never received any check out of that account. Dr. Hewitt never
 to my knowledge, received any check out of that account. I got
 \$1,000.00 out of that account. That was the latter part of May,
 1930. ** Dr. Hewitt did not get anything out of that account,
 except half of that withdrawal of \$1,000.00."

As to whether defendants received from plaintiffs con-
 firmations of the purchases and sales made by plaintiffs for defen-
 dants, this witness stated, "Well, I could not be absolutely sure
 of the number of these confirmations that I received in the ordinary
 course of the mails, or that I received these, but I probably did."
 (Referring to alleged confirmations of sales sent by plaintiffs to
 defendants, copies of which were exhibited to the witness.) "I
 received some monthly statements, but I know I did not receive them
 each month. ** I received some, but I know I did not receive any-
 thing like confirmations of all those transactions. The confirma-
 tions I did receive, I turned over to my attorney."

It seems that some time after these statements had been
 up their account with plaintiffs, plaintiffs ceased to engage in
 the brokerage business, and that the account of defendants was turned
 over to a brokerage firm in New York named Baker, Winans & Harben.
 On the part of plaintiffs, the following document was

received in evidence:

"I, J. H. H. H. H. H."

May 20, 1930

No. 730

Page 12

Your attention is called to the fact that the
 stands on our books as stated hereinabove. For use in connection
 with their periodical audit of our accounts now in progress.

11 - a

please confirm to Messrs. Haskins & Sells, Certified Public Accountants, or advise them in what particular, if any, you disagree. A stamped envelope is enclosed for your reply.

Yours very truly,

(Signed)

Campbell, Starring & Co.

Debit Balance \$5729.15

Long:

200 Col Graph.

Credit Balance \$

Short:

In view of the fact that Campbell Starring & Co. will liquidate their business as of September 30, 1929, I hereby authorize them to transfer the foregoing account to Baker, Winans & Harden, their successors, subject to the personal attention and advice of Mr. Jasper Campbell.

(Signed) I. S. Falk

As a part of and during the examination of the defendant Falk, counsel ~~for plaintiffs~~ offered, and there was received in evidence, the following document, ~~all typewritten~~, which Falk testified "was never signed either in type or handwriting to my knowledge by myself or Dr. Hewitt"; and he did not deny that it had been sent by defendants to plaintiffs:

"New York, October 1, 1929.

Messrs. Baker, Winans & Harden,
New York, N. Y.

Dear Sirs:

In consideration of your carrying a joint account for the undersigned, we jointly and severally agree to be fully and completely responsible and liable for said account and to pay


on demand and debit balance or losses at any time due in this account. Each of us has full power and authority to make purchases and sales, withdraw moneys and securities from it or do anything else with reference to said account, either individually or in our joint names, as either of us may elect, and you are authorized and directed to act upon instructions of any of us.

Any and all notices of purchases or sales or any demand for margin sent to either of us shall be binding upon us both and upon our account.

We jointly and severally agree that you shall have a lien on and may hold as collateral security for said account any and all securities and equities you may hold or have in any account at any time for us or any one of us, and that the assertion or enforcement of any such lien shall not effect or alter the liability of any of us or us all for any debit balance or loss on said account.

This arrangement shall continue until the receipt by you from us of written cancellation thereof.

Very truly yours,

 (Signed)

I. S. Falk

(Signed)

M. F. Hewitt"

Defendant Falk testified that, "Baker, Winans & Harden never called upon me to put up any collateral on that account. They never notified me in advance that they were going to sell out this Columbia Graphophone stock."

On cross-examination, the witness testified as to the stock deals that he and Hewitt made with Russell, Brewster & Co., in Chicago, and it appears from his testimony in this regard that the major portion of the deposit made with plaintiffs came from profits made by defendants through this firm of Russell Brewster & Co., and the Chicago firm of Slaughter & Company. His testimony tends to show that at the time of making his deposit with plaintiffs, he was indebted to Russell Brewster & Co., and that in order to obtain the release of certain stocks which were deposited with Campbell Starring & Co., the title to which the defendants had acquired in their dealings with Russell Brewster & Co. and Slaughter & Company, certain payments had to be made to these firms, and in regard to this matter, defendant Falk testified as follows: "I knew that Campbell

any and all power and authority to make account. Each of us has full power and authority to make purchases and sales, withdraw money and securities from it or do anything else with reference to said account, either individually or in our joint names, as either of us may elect, and you are authorized and directed to act upon instructions of any of us.

Any and all notices of withdrawal of stock or any demand for margin sent to either of us shall be binding upon us both and upon our account.

We jointly and severally agree that you shall have a lien on and any kind of collateral security for any and all securities and credits you may hold or have in any account at any time for us or any one of us, and that the execution of any instrument of any such lien shall not affect or alter the liability of any of us or all for any debit balance on loan on said account.

This arrangement shall continue until the receipt by you from us of written cancellation thereof.

Very truly yours,

L. E. WILK

E. T. NEWITT

Subscribed and sworn to before me this 1st day of May, 1907, at Chicago, Illinois.

never called upon us to pay up any balance on that account. They never notified me in advance that they were going to sell out this Columbia Graphophone stock."

On cross-examination, the witness testified as to the stock deals that he and Hewitt made with Russell, Brewster & Co., in Chicago, and it appears from his testimony in this regard that the major portion of the deposit made with plaintiffs came from profits made by defendants through this firm of Russell Brewster & Co., and the Chicago firm of Slaughter & Company. His testimony tends to show that at the time of making his deposit with plaintiffs, he was indebted to Russell Brewster & Co., and that in order to obtain the release of certain stocks which were deposited with Campbell Staring & Co., the title to which the defendants had acquired in their dealings with Russell Brewster & Co. and Slaughter & Company, certain payments had to be made to those firms, and in regard to this matter, defendant Falk testified as follows: "I knew that Campbell

Starring & Co. would have to advance a sum of money to take up these obligations with Russell Brewster and A. O. Slaughter. I knew they would have the respective shares of stock of Johns Manville stock owned or that I had purchased from my brokerage houses or that we had purchased from our brokerage houses respectively, as security for those purchases or their advances. Yes, I understood that Campbell Starring & Co. would probably hypothecate those shares of stock in order to get the money to make those advances. Certainly, that arrangement I understood perfectly. Yes, I understood that was part of the system through which brokers carried margin accounts. Yes, I understood that this was a margin account."

As stated, this witness, in the course of his examination, was shown copies of certain documents indicating that the confirmations of purchases and sales made in behalf of defendants had been sent to him by the plaintiffs. His testimony on cross examination in regard thereto, was as follows: "I think all the reports on the purchases or sales that came to me were in that form, were on this same sort of slip. It has at the top the name of the brokerage firm, Campbell Starring & Co. And the report, if it was a purchase, was 'We have this day BOUGHT for your account and risk as per instructions under conditions set forth below.' I think they were all just like that. And if it were a sale, if the report was a sale, *** the report was, 'We have this day SOLD for your account.' *** I thought that the purchases he (meaning Mr. Campbell) had made were all right, and that the sales he had made were all right. I decided to leave that account." This witness testified that he had spent that summer after his meeting with Campbell, in Europe, and that when he returned "the value of the stock had declined somewhat during the summer. We were apprised by reports what was in the account, and of the purchases and sales that had been made. We were not worried to the point of

Starring & Co. would have to advance a sum of money to take up these obligations with Russell Brewster and A. O. Wainwright. I

knew they would have the respective shares of stock of John

Merville stock owned or that I had purchased from my brokers

names or that we had purchased from our brokerage houses respective-

ly, an necessity for those purchases or their advance. Yes, I

understood that Campbell Starring & Co. would probably hypothecate

those shares of stock in order to get the money to make those advances.

Yes, I understood that Campbell Starring & Co. would probably hypothecate

stock that was part of the system through which brokers carried

margin accounts. Yes, I understood that this was a margin account.

As stated, this witness, in the course of his examination,

was shown copies of certain documents indicating that the confirma-

tions of purchases and sales made in behalf of defendants had been

sent to him by the plaintiffs. His testimony on cross examination

in regard thereto, was as follows: "I think all the reports on the

purchases or sales that came to me were in that form, were on this

form sort of slip. It was in the form of the witnesses' form.

Campbell Starring & Co. And the report, if it was a purchase, was

'We have this day BOUGHT for your account and risk as per instructions

under conditions set forth below.' I color that with all my lines

that. And if it were a sale, if the report was a sale, "We

report was, 'We have this day SOLD for your account.' " I thought

that the purchases he (meaning Mr. Campbell) had made were all right,

and that the sales he had made were all right. I decided to leave

that account. " This witness testified that he had agent that summer

after his meeting with Campbell, in Europe, and that when he returned

the value of the stock had declined somewhat during the summer, so

was satisfied by reports that was in the account, and at the purchases

and sales that had been made. He was not satisfied at the point of

saying anything about it until the end of 1929." He testified that when he returned from Europe, he found their account with Campbell Starring & Co. still showed a profit, and that he told Mr. Platt how very happy they were because of this fact, and that he did not consider closing their account. He also testified that he received a report showing that on September 30th, 1929, after certain stocks held by the brokerage firms had been sold, that there was a debit balance due from the witness and Dr. Hewitt to the brokers amounting to \$1,651.85. He was asked the following questions and gave the following answers:

"Q. Well, then you understood, did you not, that brokers ** by virtue of their relationship of broker to you, had a right to sell if there was going to be a loss in the account, if the stock was depreciating in value in the market?"

"A. Well, Mr. Campbell did."

"Q. And the brokerage firm, as brokers, naturally would have that right, would they not?"

"A. I don't know about that. I know that, so far as I know Mr. Campbell had that right."

He further testified that: "I did not then make any complaint to Mr. Campbell. I think Dr. Hewitt was in correspondence with Baker, Winans & Harden, and I was in correspondence with, and had conversation with Mr. Platt; " that "if the stock had been held, *** the loss would have been greater. I did not think the break in the market was the matter of a day, but I did not think it was going to last indefinitely."

Falk further testified in substance that the 150 shares of Johns-Manville stock, transferred to his account with plaintiffs, had gone down in price; that these securities were deposited with plaintiffs, subject to a debit balance owed by defendants to plaintiffs, and with the understanding that these stocks might be sold by plaintiffs under such circumstances; that plaintiffs were to purchase

saying anything about it until the end of 1930. He testified that when he returned from Europe, he found their account with Campbell starting a 00. He still showed a profit, and that he told Mr. Witt how very happy they were because of this fact, and that he did not consider closing their account. He also testified that he received a report showing that on September 30th, 1930, after certain stocks held by the brokerage firm had been sold, that there was a debit balance due from the witness and Dr. Hewitt to the brokers amounting to \$1,351.82. He was asked the following questions and gave the

following answers:

"Q. Well, then you understood, did you not, that proper "by virtue of their relationship of broker to you, had a right to sell it even though it was a loss in the account, if the stock was depreciating in value at the time?"

"A. Well, Mr. Campbell did."

"Q. And the brokerage firm as brokers, naturally would have that right, would they not?"

"A. I don't know about that. I know that, so far as I know Mr. Campbell had that right."

He further testified that: "I did not then make any complaint to Mr.

Campbell. I said to Hewitt and to Mr. Campbell and to Mr. Witt, and I was in correspondence with, and had conversation with Mr. Witt; that all the time had been sold, and the

loss would have been greater. I did not think the price in the market was the matter of a day, but I did not think it was going to last

indefinitely."

He further testified in substance that the 130 shares of

John-Monville stock, transferred to his account with plaintiff, had

gone down in price; that these securities were deposited with plaintiff,

and with the understanding that these stocks might be sold by plaintiff

under such circumstances; that plaintiff were to purchase

for defendants other securities from time to time; that the purchases and sales made by plaintiffs on account of defendants were all securities listed on the New York Stock Exchange, and were actually made and reported, and that defendants had no doubt as to the bona fides of these transactions up to and including the 30th of September, 1929; that defendants intend that plaintiffs could and should handle the joint account, and that there should be actual purchases and sales of actual securities, and that he assumed when Mr. Campbell reported and defendants received the report that purchases and sales had been made on account of defendants, that they were actually made, and that defendants never intended that any pretended purchases or sales should be made.

The books of plaintiffs were introduced in evidence, together with the testimony of various witnesses produced by them, and this, together with other documents in evidence, and the testimony of all the witnesses, including that of defendants, tends to establish the fact that in their dealings with defendants, plaintiffs made actual and bona fide purchases and sales of stocks for defendants' account. As we read the New York statutes, upon which defendants predicate their right to recover the money deposited with plaintiffs, such right to recover depends upon whether the purchase or sales were made in fact and in good faith, and there seems to be no distinction as to whether the purchase or sale was made for cash, or upon a margin deposited on account of such purchase or sale. There is nothing in the record to indicate that these defendants entered into this deal, as alleged in their statement of claim, for the purpose of gambling. The testimony of Falk negatives this theory, and his testimony in this regard, which we have quoted at some length, is corroborated substantially by that of the defendant Hewitt.

for defendants other securities from time to time; that the purchases

and sales made by plaintiffs on account of defendants were all securities listed on the New York Stock Exchange, and were actually made and reported, and that defendants had no doubt as to the bona

fides of these transactions up to and including the date of defendants' 1932; that defendants intend that plaintiffs could and should handle

the joint account, and that there should be actual purchases and sales of actual securities, and that he assumed when Mr. Campbell

reported and defendants received the report that purchases and sales had been made on account of defendants, that they were actually made, and that defendants never intended that any pretended purchases or sales should be made.

The books of plaintiffs were introduced in evidence, together with the testimony of various witnesses produced by them,

and this, together with other documents in evidence, and the testimony of all the witnesses, including that of defendants, tends to

show that from the time of their dealing with defendants, plaintiffs made actual and bona fide purchases and sales of stocks for defendants' account. As we read the New York statutes, upon which defendants predicate their right to recover the money deposited with

plaintiffs, such right to recover depends upon whether the purchase or sales were made in fact and in good faith, and there seems to be no distinction as to whether the purchase or sale was made for cash or upon a margin deposited on account of such purchase or sale.

There is nothing in the record to indicate that these defendants entered into this deal, as alleged in their statement of claim, for

the purpose of gambling. The testimony of Falk negatives this theory, and his testimony is to the effect, which we have stated at some length, is corroborated substantially by that of the defendant

It is indicated by the record that on October 29th, 1929, when certain stocks held by plaintiffs for defendants were sold by plaintiffs, that as a result defendants then owed plaintiffs a balance of \$620.51, and that the same has never been paid.

No question is raised here but that defendants are indebted to plaintiffs in the amount of their claim, and that they had the right to a judgment for that amount if the dealings were bona fide. The right of plaintiffs to recover, of course, depends upon whether defendants have established their right to recover under the set-off for the moneys deposited with plaintiffs upon the theory that the whole transaction was gambling, and that there was no purchase or sale made in good faith by plaintiffs for defendants. At the close of all of the evidence, the court instructed the jury to find against plaintiffs on their claim. This was equivalent to directing the jury to find for the defendants, and in effect, was a finding that the transaction was gambling, that the dealings between the parties were unlawful, that the purchases and sales alleged to have been made by plaintiffs for defendants were fictitious and were in fact, never made and never intended to be made, and that defendants had established their right to recover. Whether the alleged purchases and sales were actually made by plaintiffs or not, was a question of fact which, under all the evidence, should have been left to the jury to consider,

We are of the opinion that the court was in error in directing the jury to find against plaintiffs on their claim, and in not submitting all the questions of fact to the jury. Therefore, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

It is indicated by the record that on October 20th, 1933, when certain stocks held by plaintiffs for defendants were sold by plaintiffs, that as a result defendants then owed plaintiffs a balance of \$280.51, and that the same has never been paid.

No question is raised here but that defendants are indebted to plaintiffs in the amount of their claim, and that they had the right to a judgment for that amount if the dealings were bona fide. The right of plaintiffs to recover, of course, depends upon whether defendants have established their right to recover under the set-off for the moneys deposited with plaintiffs upon the theory that the whole transaction was gambling, and that there was no purchase or sale made in good faith by plaintiffs for defendants. At the close of all of the evidence, the court instructed the jury to find against plaintiffs on their claim. This was equivalent to directing the jury to find for the defendants, and in effect, was a finding that the transaction was gambling, that the dealings between the parties were unlawful, that the purchases and sales alleged to have been made by plaintiffs for defendants were fictitious and were in fact, never made and never intended to be made, and that defendants had established their right to recover. Whether the alleged purchases and sales were actually made by plaintiffs or not, was a question of fact which, under all the evidence, should have been left to the jury to consider.

We are of the opinion that the court was in error in directing the jury to find against plaintiffs on their claim, and in not submitting all the questions of fact to the jury. Therefore, the judgment is reversed and the cause remanded.

REVEREND JUSTICE

37510

MIKE SUFA and REGINA SUFA,
Plaintiffs (Appellees)

v.

LADISLAW VACEK and MARIE VACEK,
(Impleaded with Rudolph Vacek
and Josephine Vacek)

Defendants (Appellants)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 644²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against defendants for the sum of \$1,145.00 and costs of suit. The judgment is dated February 10th, 1934, and was entered upon a promissory note for \$1,000.00, dated at Chicago, September 11th, 1926, and executed by Rudolph Vacek, Josephine Vacek, Ladislav Vacek and Marie Vacek. The note is made payable to the bearer in five years after its date, with interest at the rate of 6 $\frac{1}{2}$ % per annum, and recites that it is secured by a trust deed to E. H. Bluhm, as trustee, on certain real estate in Lake County, Illinois, bearing even date with the date of the note.

An affidavit of merits filed by defendants recites, in substance, that defendants admit that they made the note in question, but deny that the plaintiffs are the legal owners and holders thereof. They allege that at the time the note was executed, they were the legal owners of the real estate referred to, and that afterwards on the 26th day of February, 1929, they conveyed title to the real estate to the Libertyville Trust and Savings Bank, as trustee under the provisions of a trust agreement dated February 21st, 1929, of which trust, Robert H. Baldwin, was the sole beneficiary; that on the 1st day of October, 1931, for a valuable consideration, and after the note had matured by its terms on September 11th, 1931,

WILLIAMS AND BERNARD BROTHERS

(Incorporated in Illinois)

7.

ROBERT M. BERNARD BROTHERS
(Incorporated in Illinois)
and Josephine Vasek

Defendants (Plaintiffs)

279 I.A. 644

THE COURT HAS REVIEWED THE RECORD IN THIS CASE.

This is an appeal from a judgment of the Municipal Court of Chicago against defendants for the sum of \$1,142.00 and costs of suit. The judgment is dated February 10th, 1934, and was entered upon a promissory note for \$1,500.00, dated at Chicago, September 11th, 1928, and executed by Rudolph Vasek, Josephine Vasek, Ladislav Vasek and Marie Vasek. The note is made payable to the bearer in five years after its date, with interest at the rate of 6% per annum, and recites that it is secured by a trust deed to S. A. Blum, as trustee, on certain real estate in Cook County, Illinois, bearing even date with the date of the note.

An affidavit of merits filed by defendants recites, in substance, that defendants admit that they made the note in question, but deny that the plaintiffs are the legal owners and holders thereof. They allege that at the time the note was executed, they were the legal owners of the real estate referred to, and that afterwards on the 20th day of February, 1928, they conveyed title to the real estate to the Libertyville Trust and Savings Bank, as trustee under the provisions of a trust agreement dated February 1st, 1928, in which trust, Robert M. Bernard, was the sole beneficiary; that on the 1st day of October, 1931, for a valuable consideration, and that the note was assigned by its terms on November 11th, 1931,

by an agreement in writing, Mike Sufa, one of the plaintiffs in this cause, without the consent of the defendants, entered into a written agreement with the Libertyville Trust and Savings Bank, as trustee, to extend the maturity of the note for one year from September 11th, 1931; that afterwards on the 27th of November, 1931, E. H. Bluhm, trustee under the trust deed executed by defendants, for a valuable consideration, and without the consent of the defendants, entered into an agreement in writing with the Libertyville Trust and Savings Bank, which then held the legal title to the property, to extend the time of the payment of the note, and that by such agreement the Libertyville Trust and Savings Bank, under the trust agreement, conveyed to Bluhm, the trustee, additional collateral for the security of the note; that by reason of the extension agreements and of the conveyance to the trustee of such additional security for the indebtedness, all of which was done without the knowledge of the defendants, and because thereof, the personal liability of the defendants on such note ceased to exist. The extension agreement referred to in the affidavit of merits was introduced in evidence and contains a statement to the effect that the trust deed referred to was given by the parties as stated in the affidavit of merits. It is dated the 1st day of October, 1931, and recites in substance that on that date there was an unpaid balance due by the makers of the trust deed of the sum of \$13,400.00, and that the parties had agreed to an extension of time of payment upon the conditions set forth in the agreement, which are that the time of payment of the principal notes be extended for a period of one year from September 11th, 1931; that the covenants and agreements in the principal note and trust deed should remain in full force and effect during the extended period, and that all the covenants and agreements should be kept. It is further recited that the extension agreement is executed by the Libertyville Trust and

by an agreement in writing, Mike and, one of the plaintiffs in this
cause, without the consent of the defendant, entered into a written
agreement with the Libertyville Trust and Savings Bank, as trustee,
to extend the maturity of the note for one year from September 15th,
1931; that afterwards on the 17th of November, 1931, E. W. Wilson,
trustee under the trust deed executed by defendant, for a valuable
consideration, and without the consent of the defendant, entered
into an agreement in writing with the Libertyville Trust and Savings
Bank, which then held the legal title to the property, to extend the
time of the payment of the note, and that by such agreement the
Libertyville Trust and Savings Bank, under the trust agreement,
conveyed to Wilson, the trustee, additional collateral for the security
of the note; that by reason of the extension agreement and of the
conveyance to the trustee of such additional security for the indebted-
ness, all of which was done without the knowledge of the defendant,
and because thereof, the personal liability of the defendant on
such note ceased to exist. The extension agreement referred to in
the affidavit of merits was introduced in evidence and contains a
statement to the effect that the trust deed referred to was given
by the parties as stated in the affidavit of merits. It is dated the
1st day of October, 1931, and recites in substance that on that date
there was an unpaid balance due by the maker of the trust deed of
the sum of \$15,400.00, and that the parties had agreed to an extension
of time of payment upon the conditions set forth in the agreement,
which are that the time of payment of the principal note be extended
for a period of one year from September 15th, 1931; that the covenants
and agreements in the principal note and trust deed should remain in
full force and effect during the extended period, and that all the
covenants and agreements therein shall be kept. It is further recited that
the extension agreement is executed by the Libertyville Trust and

Savings Bank, not personally, but as trustee, in the exercise of its powers as trustee; that no personal liability should be asserted or be enforceable against the Libertyville Trust and Savings Bank or against any person beneficially or otherwise interested in the mortgaged property; that no duty would be involved upon the Libertyville Trust and Savings Bank to sequester the rents, issues and profits arising from the property, and that no obligation would be imposed upon the Libertyville Trust and Savings Bank with regard to the payment of the note. This agreement was not signed by either of the defendants. One of the witnesses to a number of signatures to the agreement, as shown by the document is "Lad Vacek", and there is testimony to the effect that this person is one of the defendants. Another of the signers of the agreement is Mike Sufa, one of the plaintiffs, who signed by his mark. Various other persons not otherwise parties to this record also signed the document.

The deed to the Libertyville Trust and Savings Bank trustee was not made by the defendants appealing, as alleged in the affidavit of merits, but was made by two other defendants, co-signers of the notes in question, who were made parties defendant in this proceeding, but were not served with process.

In the presentation of their case, defendants insist that inasmuch as the agreement made with the Libertyville Trust and Savings Bank extended the time of payment of all the unpaid notes, including the note in question, and that inasmuch as they were not parties to such extension agreement, and did not ask for nor obtain an extension of time for the payment of the notes sued on, that they are released from any liability on the note.

The case of Albee v. Gross, 250 Ill. App. 98, is cited by defendants as authority for this contention, and as decisive of this case. It is the only case mentioned in their argument. In that

Savings Bank, not personally, but as trustee, in the exercise of its power as trustee; that no personal liability should be asserted or be enforceable against the Libertyville Trust and Savings Bank or against any person beneficially or otherwise interested in the mortgaged property; that no duty would be involved upon the Libertyville Trust and Savings Bank to surrender the note, interest and profits arising from the property, and that no obligation would be imposed upon the Libertyville Trust and Savings Bank with regard to the payment of the note. This agreement was not signed by either of the defendants. One of the witnesses to a number of signatures to the agreement, as shown by the document is "Red V. Cook", and there is testimony to the effect that this person is one of the defendants. Another of the signs of the agreement is Mike White, one of the plaintiffs, who signed by his mark. Various other persons and other parties to this record also signed the document.

The deed to the Libertyville Trust and Savings Bank Trust was not made by the defendants appearing, as alleged in the affidavit of merits, but was made by two other defendants, co-signers of the notes in question, who were made parties defendant in this proceeding, but were not served with process.

In the presentation of their case, defendants insist that inasmuch as the agreement made with the Libertyville Trust and Savings Bank extended the time of payment of all the unpaid notes, including the note in question, and that inasmuch as they were not parties to the note in question, and did not ask for nor obtain an extension of time for the payment of the notes sued on, that they are released from any liability on the note.

The case of Albee v. Green, 280 Ill. App. 32, is cited by defendants as authority for this contention, and as decisive of this case. It is the only case mentioned in their argument. It is

case, a bill was filed by the trustee in a trust deed to foreclose the same. In the opinion in that case, it is recited in substance that the record shows that Albert Albee was the owner of the land in question at the time the trust deed was executed, and that the land was conveyed by mesne conveyances to one Charles F. Brandt, who assumed and agreed to pay the notes secured by the trust deed as a part consideration for the conveyance. The only question in that case was whether or not, in a case where a mortgagor sells the premises to one who agrees to assume, and does assume the mortgage and notes secured thereby, and the purchaser sells to another who likewise assumes the debt, a written agreement of the mortgagee with the last purchaser extending the time of payment for a consideration and without the knowledge or consent of the mortgagor and his grantee, releases the mortgagor and his grantee from liability for the payment of the notes, or from liability under a deficiency decree upon foreclosure and sale. The extension of the time for payment was made for the consideration of an additional one per cent interest to be paid, and the court in that case held that such an extension agreement, under the circumstances mentioned, where made for a consideration, did release the mortgagor and signer of the notes, and a great many cases are cited by the court in support of this holding. No such case, however, is here presented. On the contrary, in the agreement with the Libertyville Trust and Savings Bank, as trustee, it is expressly recited that the grantee assumes no liability for the payment of the debt. By the terms of this instrument, it is also shown that the Libertyville Trust and Savings Bank held the title as trustee, and only for certain uses and purposes set forth in the instrument, which are shown by the abstract to be as follows:

"Provides that beneficiary shall have power to give directions to deal with the title and shall be entitled to receive rents and incomes or profits as personal property.

case, a bill was filed by the trustee in a trust deed to foreclose the same. In the opinion in that case, it is recited in substance that the record shows that Albert Albee was the owner of the land in question at the time the trust deed was executed, and that the land was conveyed by mesne conveyances to one Charles F. Wrentham, who assumed and agreed to pay the notes secured by the trust deed as a part consideration for the conveyance. The only question in that case was whether or not, in a case where a mortgagor sells the premises to one who agrees to assume, and does assume the mortgage and notes secured thereby, and the purchaser sells to another who likewise assumes the debt, a written agreement of the mortgagor with the last purchaser extending the time of payment for a consideration and without the knowledge or consent of the mortgagor and his grantees, releases the mortgagor and his grantees from liability for the payment of the notes, or from liability under a deficiency decree upon foreclosure and sale. The extension of the time for payment was made for the consideration of an additional one per cent interest to be paid, and the court in that case held that such an extension agreement, under the circumstances mentioned, where made for a consideration, did release the mortgagor and signers of the notes, and a great many cases are cited by the court in support of this holding. No such case, however, is here presented. On the contrary, in the agreement with the Libertyville Trust and Savings Bank, as trustee, it is expressly recited that the grantee assumes no liability for the payment of the debt. By the terms of this instrument, it is also shown that the Libertyville Trust and Savings Bank held the title as trustee, and only for certain uses and purposes set forth in the instrument, which are shown by the instrument to be as follows:

"Provided that said bank shall have power to give assistance to said title and shall be entitled to receive rents and incomes on premises as personal property."

Provision is made for the repayment of advances if made by Trustee.

It is further understood that the beneficiaries hereunder will see to the paying of the indebtedness secured by all mortgages or Trust Deeds of record upon the property in question, as well as the indebtedness secured by the Trust Deed in the Lake County National Bank given or to be given by the Trustee in payment of the purchase of the above described real estate.

Provision is made for the beneficiaries to control and operate the property. Provision is made for payment of services of the Trustee. Signatures of the respective parties."

It is also to be noted that the extension agreement was made after the note in question had matured and after the liability of defendants had become fixed and determined. There is no proof of any consideration for such extension.

We are of the opinion that there is nothing in this extension agreement which had the effect of releasing the defendants from their obligation to pay the note in question. Therefore, the judgment of the Municipal Court is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

Provision is made for the repayment of advances if made

by Trustee.
It is further understood that the beneficiaries
hereunder shall use as the basis of the indebtedness
secured by all mortgages or trust deeds of record upon the
property in question, as well as the indebtedness secured
by the Trust deed in the Lake County National Bank given
or to be given by the Trustee in payment of the purchase
of the above described real estate.
Provision is made for the beneficiaries to control
and receive the property. Provision is made for payment
of services of the Trustee. Signatures of the respective
parties.

It is also to be noted that the extension agreement was made after
the note in question had matured and after the liability of default-
ants had become fixed and determined. There is no proof of any
consideration for such extension.

We are of the opinion that there is nothing in this
extension agreement which has the effect of releasing the debtors
from their obligation to pay the note in question. Therefore, the
judgment of the Municipal Court is affirmed.
AFFIRMED.

HERN, E. L. AND WILSON, A. GEORGE.

37538

IN THE MATTER OF THE ESTATE OF FRANK
RAYMAN, Deceased,

CHARLES RAYMAN,

Appellee;

v.

NATIONAL BUILDERS BANK OF CHICAGO,
Administrator with Will Annexed;

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

279 I.A. 644⁵

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for the sum of \$2,480.00, entered on a finding made by the court against the estate of Frank Rayman, deceased. The cause was heard in the Circuit Court on appeal from an order of the Probate Court of Cook County, allowing the claim of Charles Rayman against the estate of Frank Rayman, deceased. The claim is based upon a promissory note for \$1,500.00, alleged to have been executed by the decedent, in favor of Charles Rayman. The original claim was filed in the Probate Court on October 26th, 1932. An alleged copy of the note upon which it is based, attached to the affidavit of claim filed in the Probate Court, is typewritten and is in words and figures as follows:

"3/3/1923

For value rec'd. I promise to pay Brother Charley

\$1500.00 6% interest.

Frank Rayman"

The original note offered and received in evidence in both courts in support of the claim, all of which is typewritten except the signature, is as follows:

"3/3/1923

For value recd I promise to pay Bro Charley \$150000

6 % int.

Frank Rayman"

IN THE MATTER OF THE ESTATE OF FRANK
WYMAN, Deceased.

CHARLES WYMAN,

Appellee,

v.

ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Administrator with Will Annexed,

Appellant.

289 I.A. 644

THE JUSTICE SHALL DELIVER THE VERDICT IN THE CASE.

This is an appeal from a judgment of the Circuit Court of Cook County for the sum of \$2,480.00, entered as a finding made by the court against the estate of Frank Wyman, deceased. The case was heard in the Circuit Court on appeal from an order of the Probate Court of Cook County, allowing the claim of Charles Wyman against the estate of Frank Wyman, deceased. The claim is based upon a promissory note for \$1,500.00, alleged to have been executed by the decedent, in favor of Charles Wyman. The original claim was filed in the Probate Court on October 28th, 1932. An alleged copy of the note upon which it is based, attached to the affidavit of claim filed in the Probate Court, is typewritten and is in words and figures as follows:

"\$1,500.00"

"For value rec'd. I promise to pay Brother Charles

\$1500.00 @ interest.

Frank Wyman"

The original note offered and received in evidence in both courts in support of the claim, all of which is typewritten except the

signature, is as follows:

"3/3/1932"

For value rec'd I promise to pay Bro Charles \$1500.00 &

"3/3/1932"

Frank Wyman"

There was also received in evidence, a letter written by the decedent to the claimant, which is admitted by both parties to be genuine, which letter is in words and figures as follows:

"Edwardsburg, Mich. 12/12/28

Bro Charley:

Just received word that you did not want me to sign any papers for George. Now I have all ready signed as Nett give him all her papers befor she went to the hospital and told him to take care of everything in as much as he is the oldest and intitled to his part. Also in regard to the money I owe you I am not in position to pay now. It is up to us to see that all bills are paid. I don't see why you should hold out by not signing. See if we can get some of our money back that is the way I feel about it. I wanted Netts dishes as I had them stored for years.

Yours as ever

Frank"

It is claimed by the administrator of the estate of Frank Rayman that there is a variance between the document offered in evidence as the note of Frank Rayman, and the alleged copy attached to the claim; that the signature of the document introduced in evidence is not the genuine signature of Frank Rayman, deceased; that the claim is stale, and that there was not sufficient evidence to justify the court in finding for the claimant. Considerable testimony was offered by the claimant in support of the claim.

Celia Rayman, a sister of the claimant, testified in substance that she had knowledge of business dealings between the brothers; that on one occasion in Henrici's Restaurant in Chicago she listened to a conversation between the claimant and his brother, Frank Rayman, decedent, and that Frank said to Charley, "I am very sorry I haven't the money to give you, Charley, but here is a note", and that Frank then gave Charley the document produced in evidence, and that Charles turned it over to the witness. This witness also testified that in February, 1923, in a conversation between the claimant and decedent, she heard decedent tell claimant that he would arrange to pay claimant

There was also received in evidence, a letter written by the decedent to the claimant, which is admitted by both parties to be genuine, which letter is in words and figures as follows:

*Schwartzburg, Mich. 11/12/28

Mrs. Charles:

Just received word that you did not want me to sign any papers for George. Now I have all ready signed as best I can. I have all my papers before me and I have told him to take care of everything in as much as he is the owner and I am not. Also in regard to the money I owe you I am not in position to pay now. It is up to me to see that all bills are paid. I don't care any you should hold out by not signing. Let it be as you say. I will not sign any more of the money I owe you. I will not sign any more of the money I owe you. I will not sign any more of the money I owe you.

Yours as ever

Frank

It is claimed by the administrator of the estate of Frank that there is a variance between the document offered in evidence as the note of Frank Payman, and the alleged copy attached to the claim; that the signature of the document introduced in evidence is not the genuine signature of Frank Payman, deceased; that the claim is stale, and that there was not sufficient evidence to justify the court in finding for the claimant. Considerable testimony was offered by the claimant in support of the claim.

Helia Payman, a sister of the claimant, testified in substance that she had knowledge of business dealings between the brothers; that on one occasion in Henrikel's Restaurant in Chicago she listened to a conversation between the claimant and his brother, Frank Payman, deceased, and that Frank said to Charles, "I am very sorry I haven't the money to give you, Charles, but here is a note", and that Frank then gave Charles the document produced in evidence, and that Charles turned it over to the witness. This witness also testified that in February, 1928, in a conversation between the claimant and decedent, she heard decedent tell claimant that he would arrange to pay claimant

the \$1,500.00 due him.

J. C. Keller, a witness on behalf of the claimant, testified in substance that he was present at the meeting testified to by the former witness at Henrici's Restaurant; that he saw Frank hand Charley a piece of paper; that he saw the paper after this occurrence, and that it was the same paper that was introduced in evidence.

Various hand writing experts were produced by the contending parties. Some of them testified that the signature of Frank Rayman on the note in question was genuine, and others that it was not. There was no evidence offered by defendant to deny that the claim is bona fide, except that of the handwriting experts.

In the letter of Frank Rayman dated December 12th, 1928, after the making of the note, is an acknowledgment of an indebtedness by the decedent to claimant. It may be noted that in this letter, decedent addresses his brother as "Bro Charley," which is the same as that of the payee on the note. It is not contended that the amount of the judgment, including interest from the date of the instrument, is not correct - provided the claim is bona fide.

We are of the opinion that the claim was established; that there is sufficient evidence to prove what the maker of the instrument intended as to the amount which he agreed to pay, that is to say, \$1,500.00 with interest at 6% from the date, and that the court was not in error in entering the judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

the \$1,500.00 due him.

J. V. Keller, a witness on behalf of the claimant, testified in substance that he was present at the meeting testified to by the former witness at Henrich's Restaurant; that he saw Frank Hand Charley a piece of paper; that he saw the paper after this occurrence, and that it was the same paper that was introduced in evidence.

Various hand writing experts were produced by the defendant, some of whom testified that the signature of Frank Hand Charley on the note in question was genuine, and others that it was not. There was no evidence offered by defendant to deny that the claim is bona fide, except that of the handwriting experts.

In the letter of Frank Hand Charley dated December 12th, 1908, after the making of the note, in an acknowledgment of an indebtedness by the decedent to claimant. It may be noted that in this letter, decedent addresses his brother as "Brother Charley," which is the same as that of the paper on the note. It is not contended that the amount of the judgment, including interest from the date of the instrument, is not correct - provided the claim is bona fide.

We are of the opinion that the claim was established; that there is sufficient evidence to prove what the maker of the instrument intended as to the amount when he agreed to pay, and as to the \$1,500.00 with interest at 6% from the date, and that the court was not in error in entering the judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMAS P. O'NEILL, J. CLERK.

37569

WILLIAM M. DAVIS,

(Plaintiff) Defendant in Error,

v.

FRANK P. KRETCHMER, LAURA KRETCHMER,
FRANK J. JACOBSON and BLANCHE
JACOBSON,

(Defendants) Plaintiffs in Error.

WRIT OF ERROR TO

CIRCUIT COURT

COOK COUNTY.

279 I.A. 644⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Judgment was entered against the defendants in the Circuit Court of Cook County on January 21st, 1933, for the sum of \$15,542.87. The action is by plaintiff against defendants on two promissory notes dated September 26th, 1925, each for the sum of \$8,000.00 and payable on or before 1 year after date to William M. Davis, with interest from their date at the rate of 8% per annum. The notes were signed by Frank P. Kretchmer, Laura Kretchmer, Frank J. Jacobson and Blanche Jacobson. The notes show by endorsements thereon that various payments of interest and principal had been made. The claim was for the sum of \$10,500.00 together with interest from September 25th, 1927. The notes had been given as part payment for certain lands purchased by two of the defendants in the state of Florida. After issues joined, the cause was submitted to a jury, a verdict by direction of the court was returned in favor of plaintiff, the judgment referred to was entered, and it is sought by the writ of error herein to review this judgment. Plaintiff filed two special counts in his declaration, together with the common counts. Defendants filed a plea of the general issue supported by an affidavit of merits, and a special plea to which a special replication was filed. By this affidavit of merits filed September 27th, 1929, signed and sworn to by Frank J. Jacobson on behalf of all the defendants, it is set forth that at the time of the transaction in question the defendants resided in the city of Chicago; that they bought certain lands in Florida

WILLIAM E. DAVIS

(Plaintiff) Defendant in Error

v.

FRANK L. JACOBSON, Individually,
FRANK L. JACOBSON and ELIZABETH
JACOBSON

(Defendants) Plaintiffs in Error

CHANCERY COURT

JOHN COUNTY,

27911.644

MR. JUSTICE WILL DELIVERED THE WRIT OF THE COURT.

Judgment was entered against the defendants in the Circuit Court of Cook County on January 21st, 1934, for the sum of \$15,843.87. The action is by Plaintiff against defendants on two promissory notes dated September 28th, 1928, each for the sum of \$5,000.00 and payable on or before 1 year after date to William E. Davis, with interest from their date at the rate of 6 per annum. The notes were signed by Frank L. Jacobson, Individually, Frank L. Jacobson and Elizabeth Jacobson. The notes were by defendants issued first various promissory notes of interest and principal had been made. The claim was for the sum of \$15,843.87. Plaintiff also interest took September 21st, 1934. The notes had been given as part payment for certain lands purchased by two of the defendants in the state of Florida. After interest joined, the notes were admitted to a jury, a verdict of dismissal of the court was returned in favor of Plaintiff, the judgment entered was entered, and it is sought by the writ of error herein to review this judgment. Plaintiff filed and special verdict in his declaration, together with the common counts. Defendants filed a plea of non general issue supported by an affidavit of merits, and a special plea to which a special replication was filed. By this affidavit of merits filed September 27th, 1933, signed and sworn to by Frank L. Jacobson on behalf of all the defendants, it is set forth that at the time of the transaction in question the defendants resided in the city of Chicago; that they bought certain lands in Florida

through H. B. Hunter by mail or telegraph; that they had no knowledge or experience concerning lands in Florida, and had no knowledge concerning the value, character, condition or location of the lands so purchased, but that the defendants relied wholly upon the representations and statements of Hunter, who was the agent of the plaintiff; that Hunter, for the purpose of inducing the defendants to purchase the lands, represented that they were high, consisted of twelve subdivided lots improved and surrounded by streets, sidewalks and other similar improvements, and were within and adjacent to a built up and populated section within and adjoining the city of St. Petersburg, Florida; that various buildings were in process of construction in or near the property; that the land overlooked a golf course which was then being platted and about to be developed and improved with buildings; that a street car line was about to be extended and established to run along and opposite the property; that the parcel of land was of a value of \$30,000.00; that defendants, relying on these statements and believing them to be true, purchased the land in question for a consideration of \$30,000.00, subject to an incumbrance of \$8,000.00; that they paid the plaintiff \$6,000.00 in cash and executed the notes in question, upon which they have since paid the sum of \$5,500.00. It is alleged in this affidavit of merits that the statements made by Hunter were false; that the lands were low; that there were no improved streets or sidewalks adjacent thereto; that it was not adjacent to a built-up section within or adjacent to the city of St. Petersburg, but consisted of wild and unimproved land located several miles from St. Petersburg in a sparsely populated and unimproved locality; that there was no golf course overlooking the property, as alleged, and that no street car line had been extended or established along or near the property.

There is no claim that the verdict and judgment are excessive. The whole case turns

through H. B. Hunter by mail or telephone; that they had no knowledge or experience concerning lands in Florida, and had no knowledge concerning the value, character, condition or location of the lands so purchased, but that the defendants relied wholly upon the representations and statements of Hunter, who was the agent of the plaintiff; that Hunter, for the purpose of inducing the defendants to purchase the lands, represented that same were high, consisted of twelve undivided lots improved and surrounded by streets, sidewalks and other similar improvements, and were within and adjacent to a built-up and populated section within and adjoining the city of St. Petersburg, Florida; that various buildings were in process of construction in or near the property; that the land overlooked a golf course which was then being platted and about to be developed and improved with buildings; that a street car line was about to be extended and established to run along and opposite the property; that the parcel of land was of a value of \$30,000.00; that defendants, relying on these statements and believing them to be true, purchased the land in question for a consideration of \$30,000.00, subject to an advance of \$8,000.00; that they paid the plaintiff \$2,000.00 in cash and executed the notes in question, upon which they have since paid the sum of \$8,500.00. It is alleged in this affidavit of merits that the statements made by Hunter were false; that the lands were low; that there were no buildings or sidewalks adjacent thereto; that it was not adjacent to a built-up section within or adjacent to the city of St. Petersburg, but consisted of low and undeveloped land located several miles from St. Petersburg in a sparsely populated and unimproved locality; that there was no golf course overlooking the property, as alleged, and that no street car line had been intended or established along or near the property. There is no claim that the verdict and judgment are erroneous. The whole case turns

upon the questions as to whether or not there was fraud practiced of the notes, in the procurement/ and whether Hunter, the real estate broker, was the agent of the seller or the buyer. Also it is insisted that inasmuch as plaintiff had been adjudged a bankrupt subsequent to the beginning of this action, that, therefore, he could not maintain the action.

It appears that M. C. Kretchmer, father of the defendant, Frank P. Kretchmer, had about completed the purchase of the property referred to, when he died on September 28th, 1925.

There was admitted in evidence on behalf of plaintiff a deed dated September 26th, 1925, from William M. Davis and wife to Frank P. Kretchmer and Frank J. Jacobson, conveying to them as joint tenants the lands in question.

Frank P. Kretchmer testified in substance that shortly before M. C. Kretchmer's death, Kretchmer senior had received a letter dated September 19th, 1925, from H. J. Hunter, whose letter-head indicates that he, Hunter, was then a real estate broker at St. Petersburg, Florida. This letter was received in evidence, and in it Hunter acknowledges the receipt of a check from Kretchmer senior. It states that his firm is advertising a lot of Kretchmer senior, not involved in this litigation, situated in the city of St. Petersburg; that a certain Block 12 in the city of St. Petersburg had been withdrawn from the market; that he, Hunter, had sold two other blocks in a certain subdivision, one for \$26,000.00 and another for \$25,000.00, and that his firm could purchase Block 20 in this same subdivision - the block in question - which he considered a good purchase, for \$30,000.00, one fifth to be paid in cash, the balance to be paid in one, two and three years, with interest on the deferred payments at 8% per annum. It is stated in this letter that the block is high and dry, and that the reason the writer considered it an exceptionally good purchase was that he deemed it

upon the question as to whether or not there was fraud practiced in the procurement of the notes, and whether Hunter, the real estate broker, was the agent of the seller or the buyer. Also it is insisted that inasmuch as plaintiff had been adjudged a warranty defendant to the beginning of this action, that, therefore, he could not maintain the action.

It appears that E. G. Kretschmer, father of the defendant, Frank E. Kretschmer, had about completed the purchase of the property referred to, when he died on September 28th, 1922.

There was admitted in evidence on behalf of plaintiff a deed dated September 28th, 1922, from William M. Davis and wife to Frank E. Kretschmer and Frank J. Jacobson, conveying to them as joint tenants the lands in question.

FRANK E. KRETCHMER TESTIFIED AS FOLLOWS THAT ABOUT

before E. G. Kretschmer's death, Kretschmer senior had received a letter dated September 12th, 1922, from E. L. Hunter, whose initials were indicated that Mr. Hunter was then a real estate broker at St. Petersburg, Florida. This letter was received in evidence, and in it Hunter acknowledges the receipt of a check from Kretschmer senior. It states that his firm is advertising a lot of Kretschmer senior, not involved in this litigation, situated in the city of St. Petersburg; that a certain block is in the city of St. Petersburg and was situated from the center; that Mr. Hunter had sold two other blocks in a certain subdivision, one for \$10,000.00 and another for \$12,000.00, and that his firm could purchase Block 20 in this same subdivision - the block in question - which he considered a good investment for \$20,000.00, and that he was willing to sell the balance to be paid in one, two and three years, with interest on the deferred payments at 8% per annum. It is stated in this letter that the block is high and dry, and that the reason the writer considered it an exceptionally good purchase was that he deemed it

practically certain that a proposed car line extension to Shore Acres would go through, and would run along the side of Block 20, and that if the writer had the money, he would purchase it himself. The letter further states that Block 20 on Poplar Street overlooks a golf course, and Hunter mentions certain other advantages which the property is supposed to have had. In this letter, Hunter also speaks of a check sent by Kretchmer senior to him.

On September 22nd, 1925, Kretchmer senior sent a telegram to Hunter, in which he stated, among other things, that if the golf course faced Poplar Street opposite Block 20, and if certain lots could be replatted, and if an alley could be closed without violating the city ordinance, Hunter could close the deal mentioned in the letter of September 19th, 1925, that he make the contract in the name of M. C. Kretchmer, Frank P. Kretchmer and F. J. Jacobson, and that Hunter could obtain an abstract for certain other properties at a certain address in St. Petersburg. In reply, Hunter stated that the replatting and closing of the alley, as requested, might be accomplished.

Shortly after the death of Kretchmer senior, defendant, F. J. Jacobson, telegraphed to Hunter that he and Frank P. Kretchmer would complete the purchase of the property, and that a deed should be drawn to F. J. Jacobson and Frank P. Kretchmer.

Hunter testified that at the time of the delivery of the deed, \$1,000.00 was paid to Davis, the plaintiff in this case, and subsequently \$5,000.00 was paid, and that the notes in question were subsequently delivered to Davis.

The undisputed testimony in the record indicates that for three or four years prior to the death of Kretchmer senior, he had spent the winters in St. Petersburg, and had been dealing in real estate in that and surrounding cities and towns; that he had had

practically certain that a proposed car line extension to there
would run through, and would run along the side of Block 20,
and that if the writer had the money, he would purchase it himself.
The letter further states that Block 20 on Tupper Street overlies
a golf course, and Hunter mentions certain other advantages which
the property is supposed to have had. In this letter, Hunter also
speaks of a check sent by Kristopher senior to him.

On September 22nd, 1928, Kristopher senior sent a letter
to Hunter, in which he stated, among other things, that if the
golf course were taken away from Block 20, and if certain
lots could be replatted, and if an alley could be placed without
violating the city ordinance, Hunter would close the deal mentioned
in the letter of September 18th, 1928, that he make the contract in
the name of E. O. Kristopher, Frank E. Kristopher and E. J. Jacobson,
and that Hunter could obtain an abstract for certain other properties
at a certain address in St. Petersburg. In reply, Hunter stated
that the replating and closing of the alley, as requested, might
be accomplished.

Shortly after the death of Kristopher senior, defendant,
E. J. Jacobson, who was then in St. Petersburg, was told by
would complete the purchase of the property, and that a deed should
be drawn to E. J. Jacobson and Frank E. Kristopher.

Hunter testified that at the time of the delivery of the
deed, \$1,500.00 was paid to Davis, the plaintiff in this case, and
approximately \$5,000.00 was paid, and that the notes in question were
subsequently delivered to Davis.

The undisputed testimony in the record indicates that for
three or four years prior to the death of Kristopher senior, he had
spent the winters in St. Petersburg, and had been dealing in real
estate in that and surrounding cities and towns; that he had had

certain dealings with Hunter; that Hunter and Kretchmer senior had inspected the whole of the so-called Coffee Pot addition to St. Petersburg, which included the block in question; that Kretchmer senior was familiar with and interested in the property and sought to purchase a certain Block 12 in the addition mentioned, but when it came to closing the deal, he found that this Block had been sold.

Hunter testified to the effect that he wrote to defendant, Jacobson, on February 13th, 1926, that Kretchmer senior had told him that his intention was to hold the property purchased for a year or two, and then sell it. He further testified that he became acquainted with Kretchmer senior about six months to a year prior to the Fall of 1925; that he sold certain property for him, collected interest for him, and discussed with him real estate conditions in and about St. Petersburg; that his first meeting with Kretchmer senior was when he obtained a price for him on another piece of property in 1925, and that he talked with him possibly twenty to thirty times regarding real estate between this first meeting and September, 1925; that his first conversation with Kretchmer senior about the Coffee Pot addition subdivision was in May or June, 1925, and that he visited with Kretchmer senior not only the property in question, but other property adjacent to it.

Plaintiff testified in substance that he first became acquainted with Hunter, the real estate broker, when Hunter came to his office in the summer of 1925 to inquire as to the price of Block 20 in Coffee Pot addition to St. Petersburg, and that the plaintiff had not known the broker before that time. He also testified that the next time he met Hunter was when Hunter came to him with an offer to buy this property at the price which he, the plaintiff, had already given him, and that at that time Hunter told the plaintiff he was a real estate broker, and that as a result of the conferences with

certain dealings with Hunter; that Hunter and Krothman senior had

inspected the whole of the so-called Coffee Pot addition to

St. Petersburg, which included the block in question; that Krothman

senior was familiar with and interested in the property and sought

to purchase a certain block in the addition mentioned, but when

it came to selling the deal, he found that this block had been sold.

Hunter testified to the effect that he wrote to defendant,

Jacobson, on February 13th, 1935, that Krothman senior had told

him that his intention was to hold the property purchased for a year

or two, and then sell it. He further testified that he became

acquainted with Krothman senior about six months to a year prior to

the fall of 1935; that he sold certain property for him, collected

interest for him, and discussed with him real estate conditions in

and about St. Petersburg; that his first meeting with Krothman senior

was when he obtained a price for him on another piece of property

in 1935, and that he talked with him possibly twenty to thirty times

regarding real estate between his first meeting and September, 1935;

that his first conversation with Krothman senior about the Coffee Pot

addition subdivision was in May or June, 1935, and that he visited

with Krothman senior not only the property in question, but other

property adjacent to it.

Plaintiff testified in substance that he first became

acquainted with Hunter, the real estate broker, when Hunter came to

his office in the summer of 1935 to inquire as to the price of block

30 in Coffee Pot addition to St. Petersburg, and that the plaintiff

did not know the broker before that time. He also testified that

the next day he met Hunter and also Hunter came to him with an offer

to buy this property at the price which he, the plaintiff, had already

given him, and that at that time Hunter told the plaintiff he was

real estate broker, and that as a result of the conference with

Hunter, the property was sold to the defendant, Frank P. Kretchmer and F. J. Jacobson. This witness also testified that he paid Hunter a commission on the sale, and that he had never listed the property with Hunter, but as stated, had only met him when he came with the offer to purchase it. Neither the testimony of plaintiff, Davis, nor Hunter is disputed.

A letter was introduced and received in evidence from defendant, Frank J. Jacobson, to the plaintiff dated March 26th, 1927, in which he states that he had received notice from the Central National Bank of St. Petersburg of the balance due on the notes in question, and in which the writer stated he had been delayed in closing out the Kretchmer estate, and asked for additional time in which to pay the notes.

Frank J. Jacobson testified that after the deal was closed in the first week of September, 1926, he visited the land and found that the road leading to the property was rough, that Block 20 appeared to be desolate, flat marshy ground, as far as he could see, covered with a heavy tropical or semi-tropical growth of vegetation and scrub trees; that it appeared to him to be swamp land; that he did not see any street cars running in that vicinity while he was there, and that he could not find a golf course. However, the record shows from photographs and other testimony received, that a street car line ran along the edge of the property.

The first point made by defendants is that in view of the fact that the plaintiff had been adjudged a bankrupt after the beginning of this action, he cannot, under the law, maintain this proceeding. This contention was set up by defendants in a special plea. To this plea, a special replication was filed, in which it is set forth that on November 27th, 1931, an order was entered in the bankruptcy proceeding by the referee in bankruptcy, in which it is recited that it was to the best interest of the bankrupt estate and

Hunter, the property was sold to the defendant, Frank J. Jacobson. This witness also testified that he sold Hunter and F. J. Jacobson. This witness also testified that he had never listed the property on the sale, and that he had never listed the property with Hunter, but as stated, had only met him when he came with the offer to purchase it. Neither the testimony of Plaintiff, Davis, nor Hunter is disputed.

A letter was introduced and received in evidence from defendant, Frank J. Jacobson, to the Plaintiff dated March 28th, 1937, in which he states that he had received notice from the Central National Bank of St. Petersburg of the balance due on the notes in question, and in which the writer stated he had been delayed in closing out the Kistowmar estate, and asked for additional time in which to pay the notes.

Frank J. Jacobson testified that after the deal was closed in the first week of September, 1936, he visited the land and found that the road leading to the property was rough, that Block 30 appeared to be desolate, that swampy ground, as far as he could see, covered also a heavy growth of vegetation and scrub trees; that it appeared to him to be swamp land; that he did not see any street cars running in that vicinity while he was there, and that he could not find a golf course. However, the record shows from photographs and other testimony received, that a street car line ran along the edge of the property.

The first point made by defendant is that in view of the fact that the Plaintiff had been adjudged a bankrupt after the beginning of this action, he cannot, under the law, maintain this proceeding. This contention was set up by defendant in a special plea. To this plea, a special replication was filed, in which it is set forth that on November 15th, 1934, an order was entered in the bankruptcy proceeding by the referee in bankruptcy, in which it is recited that it was to the best interest of the bankrupt estate and

its creditors that the plaintiff be authorized and directed to continue the prosecution of this cause to conclusion in his own name, and ordering that plaintiff be authorized and directed to continue the prosecution of the cause in his own name, and to pay over to the trustee in bankruptcy any moneys recovered. To this replication, defendants filed a demurrer, which was overruled by the trial court. The record also shows that on November 18th, 1931, in the District Court of the United States for the Southern District of Florida at Tampa, in that state, it was ordered that the trustee in bankruptcy be directed to enter into a contract with the firm of Chapman & Cutler of Chicago, attorneys for plaintiff herein, to prosecute this particular suit, and fixing their compensation.

In Gilbert v. Mechanics & Metals National Bank, 157 N.Y.S. 953, the court said:

"Where a party, after commencing an action, is adjudicated a bankrupt, the action does not abate, and may be continued by him, unless the trustee in bankruptcy obtains leave of the federal court and becomes substituted in the action as plaintiff (Hahle v. Cole, 112 App. Div. 636, 98 N. Y. Supp. 1049; Colgan v. Finck, 159 App. Div. 57, 144 N. Y. Supp. 408); but in such case the effect of bankruptcy is to transfer the title of the plaintiff in the action, and by the express provisions of section 756 of the Code of Civil Procedure the action may be continued in the name of the party by whom it is brought before a transfer of interest."

See also Roberts v. Fogg, 138 N. E. (Supreme Judicial Court of Mass.) 333; Mellnick v. Commercial Casualty Insurance Co. of Newark, 224 N.Y. S. 516, and Griffin v. Mutual Life Insurance Co. of N. Y., (Supreme Court of Georgia) 46 S. E. 870. We are of the opinion that plaintiff had the right to proceed with the suit.

It seems clear to this court from all the evidence in the case, that the elder Kretchmer was fully conversant and familiar with this property, and that it is reasonable to presume that the defendants were acting upon information received from him before his death, when they concluded the deal and executed the notes.

its creditors that the plaintiff be authorized and directed to continue the prosecution of this cause to conclusion in his own name, and ordering that plaintiff be authorized and directed to continue the prosecution of the cause in his own name, and to pay over to the trustee in bankruptcy any moneys recovered. To this replication, defendant filed a demurrer, which was overruled by the trial court. The record also shows that on November 18th, 1931, in the District Court of the United States for the Southern District of Florida at Tampa, in that state, it was ordered that the trustee in bankruptcy be directed to enter into a contract with the firm of Chapman & Gaskin of Chicago, attorneys for plaintiff herein, to represent this particular suit, and KLANE GALT represented.

In Galt v. Chapman & Gaskin, 135 F.2d 870, 871, 872.

353, the court said:

"Where a party, after commencing an action, is adjudged a bankrupt, the action does not abate, and may be continued by him, unless the trustee in bankruptcy obtains leave of the court to discontinue the action. In the case of Galt v. Chapman & Gaskin, 135 F.2d 870, 871, 872, the court said: 'The action was commenced by the plaintiff in the District Court of the United States for the Southern District of Florida at Tampa, in that state, on November 18th, 1931. The record also shows that on November 18th, 1931, in the District Court of the United States for the Southern District of Florida at Tampa, in that state, it was ordered that the trustee in bankruptcy be directed to enter into a contract with the firm of Chapman & Gaskin of Chicago, attorneys for plaintiff herein, to represent this particular suit, and KLANE GALT represented.'"

See also Galt v. Chapman & Gaskin, 135 F.2d 870, 871, 872.
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Galt v. Chapman & Gaskin, 135 F.2d 870, 871, 872.

Govt of Georgia) 40 F.2d 870. We are of the opinion that plaintiff had the right to proceed with the suit.

It seems clear to this court from all the evidence in the case, that the elder Westman was fully conversant and familiar with this property, and that it is reasonable to presume that the defendants were acting upon information received from him before his death, when they concluded the deal and executed the notes.

Further, the evidence clearly indicates that it was he who employed the broker Hunter to act in the matter of the purchase of the property and that it was as Kretchmer senior's agent that Hunter dealt with the plaintiff with reference to its purchase. The fact that plaintiff paid Hunter a commission is of no particular significance. It is well known that it is a familiar custom among persons purchasing real estate to have the seller pay the broker's commission on sales, even where the broker is the agent of the buyer, and it does not change the fact as to agency that this is done. (See Payne v. Newcomb, 100 Ill. 611.) If Hunter made false representations as to the character and value of the land, he did so as the agent of M. C. Kretchmer, and not as the agent of the plaintiff. However, it is our opinion that the record does not indicate that there was any fraud practiced upon defendants in this transaction, and that in view of the fact that it is so clearly established that Hunter was the agent of the buyer and not the seller, we conclude that the court was justified in directing a verdict for plaintiff. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

Further, the evidence clearly indicates that it was he who employed the broker Hunter to act in the matter of the purchase of the property and that it was as firsthand vendor's agent that Hunter dealt with the plaintiff with reference to its purchase. The fact that plaintiff paid Hunter a commission is of no particular significance. It is well known that it is a familiar custom among persons purchasing real estate to have the seller pay the broker's commission on sales, even where the broker is the agent of the buyer, and it does not change the fact as to agency that this is done. (See Hayes v. Hunter, 200 Ill. 611.) If Hunter made false representations as to the character and value of the land, he did so as the agent of M. G. Kretschmer, and not as the agent of the plaintiff. However, it is our opinion that the record does not indicate that there was any fraud practiced upon defendants in this transaction, and that in view of the fact that it is so clearly established that Hunter was the agent of the buyer and not the seller, we conclude that the court was justified in directing a verdict for plaintiff. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

APPROVED.

WILLIAM H. HARRIS, J. CLERK.

37593

ADELINE FRIZZELL,

Plaintiff - Appellee,

v.

MAYWOOD TEMPLE ASSOCIATION, a
corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

279 I.A. 645¹

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff brought her action to recover for personal injuries sustained by reason of a fall upon the steps leading into the entrance to a building owned by the defendant and was awarded damages in the amount of \$1,200 by a jury and judgment was entered on the verdict. This case is now here on an appeal from that judgment.

From the facts it appears that the defendant, Maywood Temple Association, owned a building located at the corner of Fifth avenue and Oak street, Maywood, Illinois. Part of this building was occupied by lodge halls and rooms on the upper floor. That portion of the building facing on Fifth avenue was occupied by the United States Government as a post office. The entrance to the post office, which was on Fifth avenue, was about 30 feet back from the street and there was a walk running from the street sidewalk to the building and a cement step or platform near the entrance which was from three to five inches higher than the sidewalk. The plaintiff was a resident of Maywood and had been for five years prior to the accident. She testified that on the day of the accident she had been in the post office and left it through the entrance leading to the walk which led to the street and when she had reached a point 4 or 5 feet away from the door, about where the step was, her feet slipped out from under her and she fell and sustained the injury complained of. She testified that there was mud and slush covering the step and walk and that she could not see the step because of the mud that was upon it.

2793

ADJUTANT GENERAL

DEPARTMENT - ADJUTANT

V.

ADJUTANT GENERAL

DEPARTMENT - ADJUTANT

DEPARTMENT - ADJUTANT

DEPARTMENT - ADJUTANT

2793 1.4.015

THE ADJUTANT GENERAL DEPARTMENT

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Temple Association, owned a building located at the corner of Fifth

avenue and Oak street, Maywood, Illinois. Part of this building was

occupied by lodge halls and rooms on the upper floor. That portion

of the building facing on Fifth Avenue was occupied by the United

States Government as a post office. The entrance to the post office,

which was on Fifth Avenue, was about 30 feet back from the street

and there was a walk running from the street sidewalk to the building

and a cement step or platform near the entrance which was from three

to five inches higher than the sidewalk. The plaintiff was a resident

of Maywood and had been for five years prior to the accident. She

testified that on the day of the accident she had been in the post

office and left it through the entrance leading to the walk which

led to the street and when she had reached a point 4 or 5 feet away

from the door, about where the step was, her feet slipped out from

under her and she fell and sustained the injury complained of. She

testified that there was mud and slush covering the step and walk

and that she could not see the step because of the mud that was upon

On cross-examination plaintiff testified that she went into the post office between 2:00 and 2:30 o'clock in the afternoon and was there about a half hour before leaving. She further testified that when she entered the building there was no mud or slush upon the walk or step and that it must have accumulated in the half hour she was inside. There was some evidence that people coming around the building crossed the lawn to get to the post office entrance and deposited mud upon the step and that this was what caused the fall; she testified also that when she came out of the building she did not take particular notice of the step, nor the accumulation of mud.

Defendant contends that the walk leading to the Fifth avenue entrance, and thereby into the post office, was under the control of the United States Government and that the entrance to the remaining portion of the building was on the side street known as Oak street; that the entrance, the step and walk were under the control of the government and that plaintiff was there at its invitation and not at the invitation of the defendant. It is also contended that if the walk was in proper condition at the time plaintiff entered the building, so short a time had elapsed thereafter until the happening of the accident, that the defendant could not with reasonable care have been expected to have cleared away the mud and slush, if any there was. It is further insisted that the defendant is not an insurer of the safety of the people upon the premises and that the deposit of mud or slush was one which was beyond its control.

It is without doubt a fact that the post office was occupying the premises at the time of the accident and the lease in evidence dated September 15, 1923, between the defendant company and the Postmaster General of the United States, was for a period of 10 years, which would extend it for a considerable time beyond the happening of the accident. This lease not only conveyed that portion

On cross-examination Plaintiff testified that she went into the post office between 2:00 and 2:30 o'clock in the afternoon and was there about a half hour before leaving. She further testified that when she entered the building there was no mud or splash upon the walk or step and that it must have accumulated in the Fall how she was inside. There was some evidence that people coming around the building crossed the lawn to get to the post office entrance and deposited mud upon the step and that this was what caused the Fall; she testified also that when she came out of the building she did not take particular notice of the step, nor the accumulation of mud.

Defendant contends that the walk leading to the Fifth Avenue entrance, and thereby into the post office, was under the control of the United States Government and that the entrance to the remaining portion of the building was on the side street known as Oak Street; that the entrance, the step and walk were under the control of the Government and that Plaintiff was there at the invitation and not at the invitation of the defendant. It is also contended that at the time Plaintiff entered the building, so short a time had elapsed thereafter until the happening of the accident, that the defendant could not with reasonable care have been expected to have cleared away the mud and splash, if any there was. It is further insisted that the defendant is not an insurer of the safety of the people upon the premises and that the deposit of mud or splash was one which was beyond its control. It is without doubt a fact that the post office was occupying the premises at the time of the accident and the lease is evidence that between 1913, 1914, between the defendant and the Postmaster General of the United States, was for a period of 10 years, which would extend it for a considerable time beyond the happening of the accident. This lease not only conveyed that portion

of the premises which was occupied by the post office, but also "the ways of ingress and egress thereto, and therefrom."

Plaintiff testified that after one entered the building through the post office, there was a stairway leading downstairs and one leading up to the second or third floor. A witness by the name of Bessie Van Tassel attempted to corroborate the testimony of the plaintiff by testifying that there was a stairway to the right of the entrance to the post office, leading to other rooms in the building. Her testimony is so indefinite, vague and uncertain as to carry little weight.

A witness by the name of Jacoby testified that he was secretary of the Maywood Temple Association and that at the time of the accident the post office occupied a portion of the premises and that its entrance on Fifth avenue led directly to the street; that the rest of the premises were walled off and bricked up when the post office authorities went into possession and that there was no means of entering the rest of the building except by way of the walk and entrance on Oak street. His testimony was corroborated by one Thompson, the janitor for the defendant at the time of the accident, and by one Heady who was the janitor for the post office premises. This last witness testified that it was his duty to keep the premises used by the post office, together with the sidewalk leading thereto, clean and in a proper condition.

The evidence fails to establish the charge in the declaration that the step and walk in question leading from 5th avenue into the premises used as a post office was under the control of the defendant. Where a party leases premises to another and gives the lessee exclusive possession, it becomes the duty of the lessee to keep the premises in a safe condition for its use by invitees. Marcovitz v. Hergenrether, 302 Ill. 162; West Chicago Masonic Association v. Cohn, 193 Ill. 210.

of the premises which was occupied by the post office, but also "the ways of ingress and egress thereto, and therefrom."

Plaintiff testified that after one entered the building through the post office, there was a stairway leading downstairs and one leading up to the second or third floor. A witness by the name of Jessie Van Tassel attempted to corroborate the testimony of the plaintiff by testifying that there was a stairway to the right of the entrance to the post office, leading to other rooms in the building. Her testimony is so indefinite, vague and uncertain as to carry little weight.

A witness by the name of Jacoby testified that he was secretary of the Maywood Temple Association and that at the time of the accident the post office occupied a portion of the premises and that its entrance on Fifth Avenue led directly to the street; that the rest of the premises were walled off and broken up when the post office authorities went into possession and that there was no means of entering the rest of the building except by way of the walk and entrance on Oak Street. His testimony was corroborated by one Thompson, the janitor for the defendant at the time of the accident, and by one Smith who was the janitor for the post office premises. This last witness testified that it was his duty to keep the premises used by the post office, together with the sidewalk leading thereto, clean and in a proper condition.

The evidence fails to establish the charge in the declaration that the step and walk in question leading from 5th Avenue into the premises used as a post office was under the control of the defendant. It is a fairly common practice to remove and give the lessee exclusive possession, it becomes the duty of the lessee to keep the premises in a safe condition and use by invitation. Roberts v. Thompson, 104 Ill. 2d; East Chicago Laundry Association v. Cook, 127 Ill. 2d.

The plaintiff was not upon the premises by reason of an invitation of the defendant, as from her own testimony it is clear that her sole purpose in the building was to transact business with the post office located on the premises. The accident happened in the daytime, and if there was mud and slush upon the step and walk at the time plaintiff made her exit from the building, it should have been observed by her. Dietz v. Belleville Co-op Grain Co., 273 Ill. App. 164; Jones v. Kroger Grocery & Baking Co., 273 Ill. App. 183.

There was no inherent defect in the walk or step over which plaintiff was proceeding at the time of her fall. The only ground on which negligence could at all be predicated was the fact that the mud and slush had accumulated and that it had existed long enough for the defendant, if it was in control and management of the walk, to have had a reasonable time to remove it. There is also another question which arises in cases of this character and that is whether or not plaintiff had an opportunity of observing the condition and, nevertheless, proceeded to use the step and sidewalk in departing from the premises. The owner of the premises is not an insurer.

In the case of Kresge Co. v. Fader, 116 Ohio St. 718, a somewhat similar situation appears. In that case the plaintiff sought to recover because of a slippery floor occasioned by reason of people using the entrance while it was raining and resulting in an accumulation of mud and water. The court in its opinion, said:

"Owners or lessees of stores, office buildings, banks, hotels, theaters, or other buildings where the public is invited to come on business or pleasure, are not insurers against all forms of accidents that may happen to any who come. Everybody knows that the hallways between the outside doors of such buildings and the elevators or business counters inside the building during a continued rainstorm are tracked all over by the wet feet of people coming from the wet sidewalks, and are thereby rendered more slippery than they would otherwise be. The same thing is true in the hallways of all

The plaintiff was not upon the premises by reason of an invitation of the defendant, as from her own testimony it is clear that her sole purpose in the building was to transact business with the post office located on the premises. The accident happened in the hallway, and it there was and no other way the way out walk at the time plaintiff was out from the building, it would have been observed by her. City v. Bellville 8-on 1000 273 Ill. App. 194; Jones v. Lumber Company & Building Co. 273 Ill. App. 194.

There was no inherent defect in the walk or step over which plaintiff was proceeding at the time of her fall. The only ground on which negligence could at all be predicated was the fact that the mud and snow had accumulated and that it had existed long enough for the defendant, if it was in control and management of the walk, to have had a reasonable time to remove it. There is also another question which arises in cases of this character and that is whether or not plaintiff had an opportunity of observing the condition and, nevertheless, proceeded to use the step and sidewalk in departing from the premises. The owner of the premises is not an insurer. In the case of Kearney Co. v. Fisher, 118 Ohio St. 718, a

somewhat similar situation appears. In that case the plaintiff sought to recover because of a slippery floor occasioned by reason of people using the entrance while it was raining and resulting in an accumulation of mud and water. The court in its opinion, said:

"Owners or lessees of stores, office buildings, banks, hotels, restaurants, or other buildings where the public is invited to come on business or pleasure, are not insurers against all forms of accidents that may happen to any one who enters. Everybody knows that the hallway between the entrance of such buildings and the doorway or business entrance inside the building during a continued rainstorm are trodden all over by the feet of people coming from the wet sidewalks, and are thereby rendered more slippery than they would otherwise be. The same thing is true in the hallway of all

post offices. It is not the duty of persons in control of such buildings to keep a large force of moppers to mop up the rain as fast as it falls or blows in, or is carried in by wet feet of clothing or umbrellas, for several very good reasons, all so obvious that it is wholly unnecessary to mention them here in detail.

It should be borne in mind that this accident did not happen in some dark walkway in the store where the shopper found it necessary to go. It occurred in broad daylight, and there is no pretense that there was anything to prevent any shopper from seeing and knowing precisely what the conditions were.

Not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured."

The reference to the hallways of post offices in the opinion cited is apt, inasmuch as such premises are frequented by large numbers of the public, and it is well known that mud and slush is liable to be tracked into and upon the approaches to such an edifice. To the same effect see Murray v. Bedell Co., 256 Ill. App. 347; Dudley v. Abraham, 107 N. Y. Supp. 97.

According to plaintiff's own testimony the mud and slush upon the step and walk leading from the post office must have accumulated during the period of one half hour while she was in the building. It is very doubtful whether or not such a brief time would be requisite to compel notice on the part of the defendant or the person in charge of the premises. The condition was not so inherently dangerous as to call for immediate action.

From the evidence in the record this court is of the opinion that it is insufficient to support the verdict and, therefore, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

post offices. It is not the duty of persons in control of
 these buildings to have a large force of agents in each
 one. The duty is to have a force of agents in each
 by way of checking of mailboxes, for security very good
 reasons, all so obvious that it is wholly unnecessary to
 mention them here in detail.
 It should be noted to state that this accident did not
 happen in some dark hallway in the store where the property
 is located. It occurred in a bright hallway
 and there is no pretense that there was anything to prevent
 any person from seeing and knowing precisely what the
 conditions were.
 Not every accident that occurs gives rise to a cause
 of action when the party injured has been negligent
 from some one. Thousands of accidents occur every day
 which no one is liable in damages, and often no one is to
 blame, not even the ones who are injured.

The reference to the hallway of post offices in the opinion
 cited in 897, inasmuch as such premises are frequented by large num-
 bers of the public, and it is well known that mud and slush is liable
 to be tracked into and upon the premises to such an extent. To
 the same effect see Murray v. Beall, 238 Ill. App. 347; Beall
v. Abrams, 107 E. T. Rep. 57.

According to plaintiff's own testimony the mud and slush
 upon the step and walk leading from the post office must have accumu-
 lated during the period of one half hour while she was in the building.
 It is very doubtful whether or not such a brief time would be reason-
 able to compel notice on the part of the defendant or the person in
 charge of the premises. The condition was not so instantly dangerous
 as to call for immediate action.

From the evidence in the record this court is of the
 opinion that it is insufficient to support the verdict and, therefore,
 the judgment of the superior court is reversed and the cause remanded
 for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HUBBARD, P. J. AND HALL, J. CONCUR.

37689

EVELYN KRUEGER,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

279 I.A. 645²

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Evelyn Krueger, brought her action against the City of Chicago to recover damages for personal injuries sustained when an automobile in which she was riding as a passenger ran into and collided with a landing platform located in the street which, it was claimed, at the time of the accident carried no lights which would indicate its presence at the point where the accident occurred. The accident happened on the night of September 30, 1928, and according to the testimony of the witnesses it was very dark at the time of the accident.

No point is made as to the pleadings or the instructions of the court. The cause was submitted to a jury which returned a verdict in favor of the plaintiff in the sum of \$1500.00 and no claim is made by the defendant that this amount is excessive.

The points relied upon for reversal are that the verdict is contrary to the evidence; that there is no proof of actual or constructive notice to the defendant of the condition complained of and that the plaintiff was guilty of contributory negligence as a matter of law.

From the facts it appears that the accident happened on Western avenue, which is a wide and much traveled highway located in the City of Chicago. Sometime in the year 1927, the city built a loading platform with which the automobile in which plaintiff was

EXHIBIT NUMBER

(Plaintiff) Appellee

v.

CITY OF CHICAGO, a Municipal Corporation, Defendant

(Defendant) Appellant

FILED HERE

CHICAGO COURT

COOK COUNTY

270 I.A. 645

THE COURT IN THIS MATTER HAS CONSIDERED THE EVIDENCE

PLAINTIFF, JEWELYN KESNER, BROUGHT HER ACTION AGAINST

THE CITY OF CHICAGO TO RECOVER DAMAGES FOR PERSONAL INJURIES AND

CLAIMED THAT AN AUTOMOBILE IN WHICH SHE WAS RIDING AS A PASSENGER RAN

INTO AND COLLIDED WITH A TRAILER LOCATED IN THE STREET

WHICH, IT WAS CLAIMED, AT THE TIME OF THE ACCIDENT CARRIED NO LIGHTS

WHICH WOULD INDICATE ITS PRESENCE AT THE POINT WHERE THE ACCIDENT

OCCURRED. THE ACCIDENT HAPPENED ON THE NIGHT OF SEPTEMBER 30, 1938,

AND ACCORDING TO THE TESTIMONY OF THE WITNESSES IT WAS VERY DARK

AT THE TIME OF THE ACCIDENT.

NO POINT IS MADE AS TO THE PLACEMENT OF THE INSTRUCTIONS

OF THE COURT. THE CAUSE WAS SUBMITTED TO A JURY WHICH RETURNED A

VERDICT IN FAVOR OF THE PLAINTIFF IN THE SUM OF \$1500.00 AND NO

CLAIM IS MADE BY THE DEFENDANT THAT THIS AMOUNT IS EXCESSIVE.

THE POINTS RELIED UPON FOR REVERSAL ARE THAT THE VERDICT

IS CONTRARY TO THE EVIDENCE; THAT THERE IS NO PROOF OF ACTUAL OR

CONSTRUCTIVE NOTICE TO THE DEFENDANT OF THE CONDITION COMPLAINED OF

AND THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS

A MATTER OF LAW.

FROM THE FACTS IT APPEARS THAT THE ACCIDENT HAPPENED ON

WESTERN AVENUE, WHICH IS A SIDE AND MICH TRAVELED HIGHWAY LOCATED

IN THE CITY OF CHICAGO. SOMETIME IN THE YEAR 1937, THE CITY BUILD

A TRAILER WITH WHICH THE AUTOMOBILE IN WHICH PLAINTIFF WAS

riding collided. This platform extended north from Grace street, an intersecting street in the city, about 100 feet. It was about three feet west of the southbound street car track in Western avenue and five or six feet wide. It was six or eight inches above the street level and at the north end of this loading platform was a concrete block five or six feet wide and about four feet high. The platform was located about three feet from the nearest street car rail. It was intended as a loading platform for persons intending to take passage on the street cars and was equipped with automatic lights for the purpose of warning motorists operating their machines along Western avenue. The lighting system was installed by the Welsbach Company, under the direction of the city, and was operated by this company under an arrangement with the city.

The accident happened about 7 o'clock on the night of September 30, 1928, and from the evidence it appears that the automatic lights were out of order and had been since September 28. A witness produced by the city and employed by the Welsbach Company, testified that during this emergency he would hang a kerosene lantern upon this loading platform and other loading platforms where the lights were not operating and that he customarily started out for this purpose about 4:30 o'clock in the afternoon.

The car in which plaintiff was riding was driven by one Tulke. At the time of the accident the plaintiff was of the age of 13 years and was riding in the front seat with the driver.

Tulke testified that at the time of the accident he was driving in a southerly direction in the middle of Western avenue; that the brakes on his car were good; that he was driving at a speed of about 20 miles an hour; that he did not see any lights nor did he observe the obstruction until it was too late to stop the car. He testified that his eyesight was good, but that the street was dark; that when his car hit the loading platform it turned over.

riding collided. This platform extended north from Grove street, an interesting street in the city, about 100 feet. It was about three feet west of the southbound street car track in western avenue and five or six feet wide. It was six or eight inches above the street level and at the north end of this loading platform was a concrete block five or six feet wide and about four feet high. The platform was located about three feet from the nearest street car rail. It was intended as a loading platform for persons intending to take passage on the street cars and was equipped with automatic lights for the purpose of warning motorists operating their machines along western avenue. The lighting system was installed by the Welshbach Company, under the direction of the city, and was operated by this company under an arrangement with the city.

The accident happened about 7 o'clock on the night of September 30, 1938, and from the evidence it appears that the automatic lights were out of order and had been since September 30. A witness produced by the city and employed by the Welshbach Company, testified that during this emergency he would hang a kerosene lantern upon this loading platform and other loading platforms where the lights were not operating and that he customarily started out for this purpose about 6:30 o'clock in the afternoon.

The car in which plaintiff was riding was driven by one Tulke. At the time of the accident the plaintiff was of the age of 13 years and was riding in the front seat with the driver. Tulke testified that at the time of the accident he was driving in a southerly direction in the middle of western avenue; that the brakes on his car were good; that he was driving at a speed of about 30 miles an hour; that he did not see any lights nor did he observe the obstruction until it was too late to stop the car. He testified that his eyesight was good, but that the street was dark; that when his car hit the loading platform it turned over.

Plaintiff testified in her own behalf that at the time of the accident it was dark and that they were going in a southerly direction along Western avenue when they struck something and the automobile turned over and that she did not remember anything more; that the car (automobile) was not going fast and that she did not see what it was the car (automobile) hit; that she was looking ahead but did not see any light in the street.

Robert Isendrath, a witness on behalf of the plaintiff, testified that he also was driving south on Western avenue about seven o'clock on the evening upon which the accident happened and that it was quite dark; that when he was about 25 feet from the island or platform, he was about to pass the automobile in which plaintiff was riding and that his automobile was about 10 feet ahead of Tulke's when he saw the front of the island and that at that time the island or loading platform was about 25 feet away and that there were no lights upon it; that he passed the island and drew up to the curb and went back to the scene of the accident.

Martha Schultz was riding in the car with plaintiff at the time of the accident and testified that it was dark and that there were no lights on the platform.

After the accident plaintiff was taken to a hospital where it was found she had received a transverse fracture of the right tibia.

We see no point in the proposition advanced on behalf of the defendant that it had no notice of the obstruction in the street. It was constructed by the defendant and it would naturally be presumed that the defendant, the City of Chicago, would know where it was located and the manner in which it was constructed.

There is evidence sustaining plaintiff's position that there were no lights at the time of the accident. The direct testimony of witnesses is borne out by the fact that it was admitted

Plaintiff testified in her own behalf that at the time of the accident it was dark and that they were going in a southerly direction along Western Avenue when they struck something and the automobile turned over and that she did not remember anything more; that the car (automobile) was not going fast and that she did not see what it was the car (automobile) hit; that she was looking ahead but did not see any light in the street.

Robert Iaschnitzky, a witness on behalf of the plaintiff, testified that he also was driving south on Western Avenue about seven o'clock on the evening upon which the accident happened and that it was quite dark; that when he was about 25 feet from the island or platform, he was about to pass the automobile in which plaintiff was riding and that his automobile was about 10 feet ahead of Lukie's when he saw the front of the island and that at that time the island or looking platform was about 25 feet away and that there were no lights upon it; that he passed the island and drove up to the curb and went back to the scene of the accident.

Plaintiff testified in her own behalf as was the time of the accident and testified that it was dark and that there were no lights on the platform.

After the accident plaintiff was taken to a hospital where it was found she had received a transverse fracture of the right tibia. He set no point in the proposition advanced on behalf of the defendant that it was no notice of the obstruction in the street. It was contended by the defendant and it would naturally be presumed that the defendant, the City of Chicago, would know where it was located and the manner in which it was constructed.

There is evidence concerning defendant's position that there were no lights at the time of the accident. The direct testimony of witnesses is borne out by the fact that it was admitted

that the automatic lights were out of order and had been for two days. The jury could well draw the inference that the employee charged with the duty of placing the kerosene lantern upon the structure had not reached it for that purpose, prior to the time of the accident.

If the defendant had placed the obstruction in the street it was necessary to warn persons using the highway of its presence, either by a light or otherwise. Its failure to have such a light upon the structure in the night time would constitute negligence.

As to the question of contributory negligence on the part of the plaintiff, it appears that at the time of the accident she was of the age of 13 years. The question of contributory negligence in a person between the ages of 7 and 14 years is one of fact for the jury. Deming v. City of Chicago, 321 Ill. 341. On the theory that it was her duty to warn the driver if she apprehended danger, it appears from the evidence that she did not see the obstruction and cannot be charged with contributory negligence if the jury believed her statements to be true. The question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff, was one of fact for the jury and we are not disposed to disturb the verdict or judgment entered thereon.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J, CONCUR.

that the automatic lights were out of order and had been for two days. The jury could well draw the inference that the employee charged with the duty of placing the necessary lantern upon the structure had not reached it for that purpose, prior to the time of the accident.

If the defendant had placed the obstruction in the street it was necessary to warn persons using the highway of its presence, either by a light or otherwise. Its failure to have such a light upon the structure in the night time would constitute negligence. As to the question of contributory negligence on the

part of the plaintiff, it appears that at the time of the accident she was of the age of 13 years. The question of contributory negligence in a person between the ages of 7 and 14 years is one of fact for the jury. Bennett v. City of Chicago, 321 Ill. 341. On the theory that it was her duty to warn the driver if she apprehended danger, it appears from the evidence that she did not see the

obstruction and cannot be charged with contributory negligence if the jury believed her statements to be true. The question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff, was one of fact for the jury and we are not disposed to disturb the verdict or judgment entered thereon. For the reasons stated in this opinion, the judgment of

the Superior Court is affirmed.

JUDGMENT AFFIRMED.

REBERT, J. J. AND HALL, J. CONCUR.

37724

CARRIE A. CROSS,

(Plaintiff) Appellee,

v.

THE PRUDENTIAL INSURANCE COMPANY,
of AMERICA, a corporation,

(Defendant) Appellant.

145
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 645³

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action by the plaintiff to recover on a life insurance policy, issued by the defendant company, in which she was named as beneficiary. There was a trial before the court and jury resulting in a verdict and judgment on the verdict for \$2,000 in favor of the plaintiff and against the insurance company, and from that judgment this appeal has been perfected.

The insurance policy in question was issued on the life of James W. Cross on May 18, 1931. Cross died on July 27, 1931, and upon the filing of proof of death, payment was refused. The policy was one of that kind wherein the statements of the applicant, in regard to his condition of health prior to the application, were taken by the insurance company in lieu of a physical examination. The application which was signed by him contained the statements and answers to the questions therein as to his condition of health and on May 18, 1931, he received the policy which also contained, attached thereto, a copy of the questions and his answers, so that at the time he received this policy, he had a further opportunity in which to consider his answers to the questions propounded, upon which he procured the issuance of the policy involved here.

Cross died a little more than two months after the policy was issued.

The application contained a recital to the effect that the statements and answers to the questions were complete and

(Plaintiff) Insurance Company,
of America, a corporation,
(Defendant) Appellant.

IN SENATE

OF CALIFORNIA

27724 I.A. 645

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.
This was an action by the plaintiff to recover on a life insurance policy, issued by the defendant company, in which she was named as beneficiary. There was a trial before the court and jury resulting in a verdict and judgment on the verdict for \$5,000 in favor of the plaintiff and against the insurance company, and from that judgment this appeal has been taken.
The insurance policy in question was issued on the life of James W. Gross on May 18, 1921. Gross died on July 27, 1921, and upon the filing of proof of death, payment was refused. The policy was one of that kind wherein the statements of the applicant in regard to his condition of health prior to the application, were taken by the insurance company in lieu of a physical examination. The application which was signed by him contained the statements and answers to the questions therein as to his condition of health, and on May 18, 1921, he received the policy which also contained, attached thereto, a copy of the questions and his answers, so that at the time he received this policy, he had a further opportunity in which to consider his answers to the questions propounded, upon which he procured the issuance of the policy involved here, Gross died a little more than two months after the policy was issued.

The application contained a policy to the effect that

the statements and answers to the questions were complete and

true and should form a part of the contract of insurance. Among the questions propounded to the applicant and the answers thereto, were the following:

- 17a. Have you ever had a serious illness? Answer No.
 17e. Do the answers to Question 17 a, b, c, d, and f constitute a complete statement of all the severe illnesses, surgical operations and hospital and sanitarium treatments which you have ever had? Answer: Yes.
 22. Have you ever had dizziness or fainting spells? Answer: No.
 23. Have you ever had disease of the bladder? Answer: No.
 23. Have you ever had albumin, blood or sugar in your urine? Answer: No.

The question in the application designated 17d, reads as follows:

"Had medical or surgical treatment in a hospital or sanitarium? No."

Appended to this question appears to be a notation that the applicant had had an operation for appendicitis in the year 1906.

The records of the Illinois Central Hospital in Chicago disclose the fact that he was an inmate of that hospital from February 14, 1927 to February 27, 1927, for diseased tonsils and secondary anemia; that he was again an inmate of that institution from November 28, 1930 to December 18, 1930, for cystitis, which is an inflammation of the bladder.

The death of the applicant, a little more than two months after the date of the policy, was represented by the attending physician as due to cerebral hemorrhage and that the contributing causes of death were diabetes mellitus and hypertension. A statement made to Dr. Dowdall of the Illinois Central Hospital, by the interne in charge, which is in writing and bears date December 19, 1930, shows that Cross stated that he had run albumen in the urine for years and had been susceptible to fainting spells. At the time of his admission to the hospital, the examination showed that he was running pus in the urine and had some badly infected teeth which were removed while he was an inmate of that institution. The

ture and should form a part of the content of answers. Among the questions propounded to the applicant and the answers thereto were the following:

- 15. Have you ever had a nervous illness? Answer: No.
- 16. As the answer to Question 15, a, b, c, d, and e, constitute a complete statement of all the nervous illnesses, surgical operations and hospital and sanitarium treatments which you have ever had? Answer: Yes.
- 17. Have you ever had diabetes or fasting spells? Answer: No.
- 18. Have you ever had disease of the bladder? Answer: No.
- 19. Have you ever had albumin, blood or sugar in your urine? Answer: No.

The question in the application numbered 17, reads as follows:

"Had medical or surgical treatment in a hospital or sanitarium?"

Appended to this question appears to be a notation that the applicant had had an operation for appendicitis in the year 1906.

The records of the Illinois Central Hospital in Chicago disclose the fact that he was an inmate of that hospital from February 14, 1937 to February 27, 1937, for diseased tonsils and secondary anemia; that he was again an inmate of that institution from November 28, 1930 to December 12, 1930, for cystitis, which is an inflammation of the bladder.

The death of the applicant, a little more than two months after the date of the policy, was represented by the attending physician as due to cerebral hemorrhage and that the contributing causes of death were diabetes mellitus and hypertension. A statement made to Dr. Dowdell of the Illinois Central Hospital, by the intern in charge, which is in writing and bears date December 25, 1937, shows that Gross stated that he had run albumen in the urine for years and had been susceptible to fasting spells. At the time of his admission to the hospital, the examination showed that he was running one in the urine and had some fairly marked blood when removed while he was an inmate of that institution. The

records of the Illinois Central Hospital also showed that he was examined in that institution on November 7, 1930 and on November 15, 1930.

From these facts it is apparent that he had concealed from the insurance company in his answers to questions asked him, the fact that he had had a serious illness and that he had been subject to dizziness and fainting spells; that he had bladder trouble and had albumen or sugar in his urine.

In the view the courts have taken in regard to the issuance of this class of policies, it is a matter of no importance as to whether or not the answers were made with the intention to deceive. The vital question is as to whether the insurance company had a right to rely upon them as true at the time it issued its policy. The questions and answers pertain to material matters and their falsity must have been known to the applicant inasmuch as the application was signed by him and was also made a part of the policy which he subsequently received.

The Supreme Court of this state in the case of The Western and Southern Life Insurance Company v. Tomasun, 358 Ill. 496, has enunciated the rule in such cases in the following language:

"In an equitable action for the cancellation of an insurance policy upon the ground that misrepresentations had been made as to facts material to the risk, it is not essential that the applicant should have willfully made such misrepresentations knowing them to be false. They will avoid the policy if they are, in fact, false and material to the risk even though made through mistake or in good faith. In United States Fidelity and Guaranty Co. v. First Nat. Bank, 233 Ill. 475, we stated this rule in the following language: 'The law is well settled, in its application to insurance contracts, that a misrepresentation of a material fact, in reliance upon which a contract of insurance is issued, will avoid the contract, and it is not essential, in equity, that such a misrepresentation should be known to be false. A material misrepresentation, whether made intentionally or knowingly or through mistake and in good faith, will avoid the policy.' The same rule has been applied in many other jurisdictions."

The Supreme Court of the United States in the case of

records of the Illinois Central Hospital also showed that he was examined in that institution on November 7, 1930 and on November 13, 1930.

From these facts it is apparent that he had concealed from the insurance company in his answers to questions asked him the fact that he had had a serious illness and that he had been subject to dizziness and fainting spells; that he had bladder trouble and had alcohol or sugar in his urine.

In the view the courts have taken in regard to the issuance of this class of policies, it is a matter of no importance as to whether or not the answers were made with the intention to deceive. The vital question is as to whether the insurance company had a right to rely upon them as true at the time it issued its policy. The questions and answers pertain to material matters and their falsity must have been known to the applicant inasmuch as the application was signed by him and was also made a part of the policy which he subsequently received.

The Supreme Court of this state in the case of The Western and Southwestern Life Insurance Company v. Thompson, 222 Ill. 400, has

enunciated the rule in words which in the following language:

"In an application for an insurance policy the insured has a duty to disclose all material facts which are known to him at the time of the application. It is not essential that the applicant should have actually made such representations knowing them to be false. They will avail the policy if they are, in fact, false and material to the issue. In every case where a material fact is concealed, the policy is void. In United States Life Insurance Co. v. Davis, 111 Ill. 473, we stated this rule in the following language: 'The law is well settled, in the application of insurance contracts, that a misrepresentation of a material fact, in relation upon which a contract of insurance is issued, will void the contract, and it is not essential, to secure, that such a misrepresentation should be known to be false. A material misrepresentation, whether made intentionally or innocently or through mistake and in good faith, will void the policy.' The same rule has been applied in many other jurisdictions."

The Supreme Court of the United States in the case of

Stipcich v. Metropolitan Life Insurance Co., 277 U. S. 311, in its opinion, says:

"Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. *** even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure. If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, Canning v. Farquhar, 18 Q. B. D. 727; McKenzie v. Northwestern Mutual Life Insurance Co., 36 Ga. App. 235, or if a policy has been issued, it has a valid defense to a suit upon it."

It would seem unnecessary to quote from further authorities in support of this proposition, but cases similar in character which have followed this rule are Rostenkowski v. Chicago National Life Insurance Company, 359 Ill. App. 673; Cohen v. New York Life Ins. Co., 256 Ill. App. 345; Lewandowski v. Western & Southern Life Ins. Co., 241 Ill. App. 55; Gennaldi v. Metropolitan Life Ins. Co., 274 Ill. App. 663; Perkins v. Prudential Ins. Co. of America, 69 Fed. (2d) 218

From our examination of the evidence we are of the opinion that the answers to the questions propounded were untrue and that they were answers to material facts which, if known to the insurance company defendant herein, could well have caused it to have refused to issue the policy in question.

In view of the fact that the applicant, by signing his application, represented the answers therein to be true, which were in fact untrue, it would serve no good purpose to remand the cause for a new trial. The judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

; 1798, 1801, 1802

On April 20, 1935, a policy was issued, it was a valid policy for the year 1935, and it was issued to the insured.

It would seem unnecessary to quote from further authorities in support of this proposition, but cases similar in character which

Page 10 of 10

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U.S. III, 407, 448; Jankowski & Soudien, 1964, p. 100.

241 III. App. 55; General v. Restoration 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 9

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that the answers to the questions propounded were untrue and that they

were answers to material facts which, if known to the insurance company,

Telegraph Agent, could well have noticed it as being referred to in the

the policy in question.

IN VIEW OF THE FACT THAT THE ABOVE-REPRODUCED DOCUMENT IS A COPY OF A COPY, THE INFORMATION CONTAINED HEREIN IS NOT GUARANTEED TO BE ACCURATE OR COMPLETE.

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Approved: _____

COPIES OF 340000

SECRET

37759

CHARLES SCHUBERT,

Plaintiff and Appellee,

v.

THE PEOPLES TRUST AND SAVINGS BANK
OF CHICAGO, a corporation,

Defendant and Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 645⁴

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles Schubert, brought this action against the Peoples Trust and Savings Bank, an Illinois corporation, to recover the purchase price of two bonds. The first was a bond for \$1,000, known as the Rose-Mont bond and was purchased June 8, 1928. The second was a bond for \$500, and was known as the 63rd and Fairfield bond and was purchased June 1, 1929. Both of these bonds were sold to the plaintiff by one Keefer.

At the time of the purchase of the first bond, known as the Rose-Mont bond, Keefer was employed by the Peoples Trust and Savings Bank of Chicago. At the time plaintiff purchased the second, the 63rd and Fairfield bond, Keefer claims that he was employed by the Peoples Securities Company and not by the Peoples Trust and Savings Bank. The plaintiff testified that he purchased both bonds on the premises occupied by the defendant and through Keefer who had a desk in the quarters occupied by defendant bank.

As to the first or Rose-Mont bond the defendant claims there was no fraud and, furthermore, that the statute of limitations had run. As to the second or 63rd and Fairfield bond, the defendant claims there was no fraud and further that the sale was made to plaintiff by the Peoples Securities Company and that, therefore, it, the defendant, is not liable.

The cause was tried before a jury which returned a verdict in favor of the plaintiff for the full amount on both bonds and

CHARLES SCHUBERT,

Plaintiff and Appellee,

v.

THE PEOPLE'S TRUST AND SAVINGS BANK
OF CHICAGO, a corporation,

Defendant and Appellant.

MUNICIPAL COURT

ATKINSON

379 I.A. 645

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles Schubert, brought this action against

the People's Trust and Savings Bank, an Illinois corporation, to recover the purchase price of two bonds. The first was a bond for \$1,000, known as the Rose-Mont bond and was purchased June 8, 1932. The second was a bond for \$500, and was known as the 63rd and Fairfield bond and was purchased June 1, 1932. Both of these bonds were sold to the plaintiff by one Keeler.

At the time of the purchase of the first bond, known as the Rose-Mont bond, Keeler was employed by the People's Trust and Savings Bank of Chicago. At the time plaintiff purchased the second, the 63rd and Fairfield bond, Keeler claims that he was employed by the People's Securities Company and not by the People's Trust and Savings Bank. The plaintiff testified that he purchased both bonds on the premises occupied by the defendant and through Keeler who had a desk in the quarters occupied by defendant bank. As to the first or Rose-Mont bond the defendant claims there was no fraud and, furthermore, that the statute of limitations had run. As to the second or 63rd and Fairfield bond, the defendant claims there was no fraud and further that the sale was made to plaintiff by the People's Securities Company and that, therefore, it, the defendant, is not liable.

The cause was tried before a jury which returned a verdict

in favor of the plaintiff for the full amount on both bonds and

judgment was entered upon the verdict and an appeal prayed and allowed to this court.

In view of the fact that there were two sales and in order that the issues may not be confused, it is advisable to consider them separately.

It is admitted that the Rose-Mont bond was purchased June 8, 1928, and was sold to the plaintiff by the defendant through Keefer and that Keefer was the agent of the defendant at the time of the sale and purchase. Plaintiff testified that Keefer at the time of the sale told him that there were no defaults under the trust deed securing the bond issue and that the monthly payments of principal and interest were promptly made. He further testified that he was given a folder describing the Rose-Mont bond and that Keefer told him that this would be a desirable investment. This circular described the location of the building, together with the transportation adjacent thereto, the value of the land and building and the annual income. It also stated that there was a provision in the trust deed securing the bonds under which \$22,000 of the \$80,000 loan was to be paid between December 15, 1927 and December 15, 1932. It also contained a provision to the effect that the borrowers were to deposit each month with the Peoples Trust and Savings Bank a certain sum of money which was for the purpose of paying the principal and interest as it fell due.

The books of the company introduced in evidence discloses the fact that at the time plaintiff purchased the bond, there was a default in these prepayments which were necessary to pay the interest and part of the principal and that at the time plaintiff purchased the bond very little had been paid in on the trust deed to take care of the interest and principal payments and the defendant had advanced

judgment was entered upon the verdict and an appeal prayed and allowed to this court.

In view of the fact that there were two sales and in order that the issues may not be confused, it is advisable to consider them separately.

It is admitted that the Rose-Mont bond was purchased June 8, 1932, and was sold to the plaintiff by the defendant

through Keeler and that Keeler was the agent of the defendant at the time of the sale and purchase. Plaintiff testified that Keeler at the time of the sale told him that there were no defaults under the trust deed securing the bond issue and that the monthly payments of principal and interest were promptly made. He further testified

that he was given a folder describing the Rose-Mont bond and that Keeler told him that this would be a desirable investment. This folder described the location of the building, together with the transportation adjacent thereto, the value of the land and building and the annual income. It also stated that there was a provision

in the trust deed securing the bonds under which \$25,000 of the \$50,000 loan was to be paid between December 15, 1937 and December 15, 1938. It also contained a provision to the effect that the borrowers were to deposit each month with the Peoples Trust and Savings Bank a certain sum of money which was for the purpose of paying the principal and interest as it fell due.

The books of the company introduced in evidence disclosed the fact that at the time plaintiff purchased the bond, there was a default in these prepayments which were necessary to pay the interest and part of the principal and that at the time plaintiff purchased the bond very little had been paid in on the trust deed to take care of the interest and principal payments and the defendant had advanced

considerably more in order to take care of these. In other words, at the time plaintiff purchased the bond there had already occurred a default in the provisions of the trust deed. These facts were not disclosed to the plaintiff and was a material fact which, if known to the plaintiff, might have resulted in his refusal to purchase.

The interest on this bond was due semi-annually and payable December 15th and June 15th of each year. The defendant continued to pay the interest up to and until December 15, 1930, and according to plaintiff's testimony, it was not until the next installment in June of 1931 became due that he was refused the interest on his bond.

In October, 1932, plaintiff went to the bank and tendered the bond plus the interest to a Mr. Weakly of the defendant company. The fact of this tender is denied by the defendant but it is admitted by Weakly that he did talk with him on or about this time concerning the bond in question. It was a question of fact for the jury as to whether or not a tender had been made.

There is no force in the contention that the statute of limitations had run, inasmuch as the defendant had concealed the defaults by the payment of interest to the plaintiff on its bond and thereby kept the obligation and the agreement alive. Skrodski v. Sherman State Bank, 348 Ill. 403; Elmore v. Johnson, 143 Ill. 513.

There were sufficient facts in evidence from which the jury could have found that at the time of the purchase of the bond by the plaintiff the provisions of the trust deed which secured the bond had not been complied with and that there was a default which the defendant concealed by the advancement of the money sufficient to pay the interest charges.

The second bond, known as the 63rd and Fairfield bond, was purchased June 1, 1929. Plaintiff testified that at the time of the

considerably more in order to take care of taxes. In other words, at the time plaintiff purchased the bond there had already occurred a default in the provisions of the trust deed. These facts were not disclosed to the plaintiff and was a material fact which, if known to the plaintiff, might have resulted in his refusal to purchase.

The interest on this bond was due semi-annually and payable December 15th and June 15th of each year. The defendant continued to pay the interest up to and until December 15, 1931, and according to plaintiff's testimony, it was not until the next installment in June of 1932 became due that he was refused the interest on his bond. In October, 1932, plaintiff went to the bank and tendered the bond plus the interest to a Mr. Weekly of the defendant company. The fact of this tender is denied by the defendant but it is admitted by Weekly that he did talk with him on or about this time concerning the bond in question. It was a question of fact for the jury as to whether or not a tender had been made.

There is no force in the contention that the statute of limitations had run, inasmuch as the defendant had concealed the default by the payment of interest to the plaintiff on its bond and thereby kept the obligation and the agreement alive. Shirahaki v. Sherman State Bank, 248 Ill. 401; Illinois v. Johnson, 146 Ill. 411. There were sufficient facts in evidence from which the

jury could have found that at the time of the purchase of the bond by the plaintiff the provisions of the trust deed which secured the bond had not been complied with and that there was a default which the defendant concealed by the advancement of the money sufficient to pay the interest charges.

The second bond, known as the 63rd and Blairfield bond, was purchased June 1, 1933. Plaintiff testified that at the time of the

purchase he had a talk with Keefer and was told by Keefer that there were no defaults under the trust deed securing the bond issue and that the monthly prepayments of principal and interest had been promptly made; that he was given a folder, describing the property, which was introduced in evidence, setting out its value and stating that provision was made for monthly deposits of principal and interest beginning April 15, 1927, in order to systematically reduce the loan.

The account kept by the defendant shows that at the time plaintiff made his purchase of this 63rd and Fairfield bond, there had already accrued defaults in the prepayments provided for and that the defendant was advancing the money to take care of the interest falling due and the maturing bonds. In this regard the situation was very similar to that surrounding the evidence in regard to the Rose-Mont bond purchased the previous year. If, as a matter of fact, the books of the company showed there was a default in the provisions of the trust deed at the time the plaintiff made his purchase, and this fact was known to the plaintiff at the time, there was such a concealment of a material fact as would vitiate the sale.

It is insisted, however, on behalf of the defendant that at the time this latter purchase was made Keefer was in the employ of a company known as the Peoples Securities Company, and that he was acting as an agent for that company and not for the defendant and that, therefore, plaintiff's right of action, if any, was against the Peoples Security Company and not against the defendant.

Plaintiff testified that at the time of the purchase of the 63rd and Fairfield bond, he entered the bank and found Keefer there seated at the same desk where he was when he, the plaintiff, had made his previous purchase of the Rose-Mont bond and that he did not know that Keefer was employed by any one other than the defendant. If Keefer was in the employ of the defendant, it would

purchase he had a talk with Keeter and was told by Keeter that there were no defaults under the trust deed securing the bond issue and that the monthly payments of principal and interest had been promptly made; that he was given a folder, describing the property, which was introduced in evidence, setting out its value and stating that provision was made for monthly deposits of principal and interest beginning April 15, 1937, in order to systematically reduce the loan. The account kept by the defendant shows that at the time Plaintiff made his purchase of this 32nd and Fairfield bond, there had already occurred default in the payments provided for and that the defendant was advancing the money to take care of the interest falling due and the maturing bonds. In this regard the situation was very similar to that surrounding the evidence in regard to the Rose-Mont bond purchased the previous year. If, as a matter of fact, the books of the company showed there was a default in the payments of the trust deed at the time the Plaintiff made his purchase, and this fact was known to the Plaintiff at the time, there was such a concealment of a material fact as would vitiate the sale. It is insisted, however, on behalf of the defendant that at the time this latter purchase was made Keeter was in the employ of a company known as the Peoples Security Company, and that he was acting as an agent for that company and not for the defendant, and that, therefore, Plaintiff's right of action, if any, was against the Peoples Security Company and not against the defendant. Plaintiff testified that at the time of the purchase of the 32nd and Fairfield bond, he entered the bank and found Keeter there seated at the same desk where he was when he, the Plaintiff, had made his previous purchase of the Rose-Mont bond and that it was then that Keeter was employed by the Peoples Security Company. It is insisted that Keeter was in the employ of the defendant, as would

be liable under the circumstances in this case. Moreover, the defendant would be liable if it held Keefer out as its agent or permitted him to occupy a position, with its consent, which would lead an unsuspecting person to presume that he was dealing with the bank. Italian Swiss Ag. Colony v. Pease, 194 Ill. 98; Stock Yards Co. v. Mallory, 157 Ill. 554.

From the evidence it appears that the Peoples Securities Company was organized sometime in the latter part of 1928, and opened its offices on the first floor of the same building in which the defendant was located on or about January 1, 1929. The facts in evidence show that the defendant company had attempted to separate its trust department from its regular banking business. A number of officers of the Peoples Securities Company were, or had been, officers of the bank. A number of the employees of the bank were transferred to and employed by the Peoples Securities Company. The bank proper occupied the premises on the ground floor of the building located at the corner of Michigan avenue and Washington street in the city of Chicago. A main entrance to this building was next door to the bank entrance and persons entering the building at the main entrance entered a corridor which extended around the bank and out upon Washington street, a side street intersecting Michigan avenue. There was an exit at the rear of the bank on to this corridor and directly opposite was an entrance off the same corridor to the offices of the Peoples Securities Company, which was in the same building, but whose main entrance was on Washington street. There appears to have been a sign over the door on Washington street which read: "Peoples Securities Company." There was also a similar sign over the corridor entrance. In other words, employees of the bank or its patrons could pass directly from the bank to the Peoples Securities Company by crossing the corridor, without leaving the building. It appears that the lease to the premises occupied by

be liable under the circumstances in this case. Moreover, the defendant would be liable if it held Kester out as its agent or permitted him to occupy a position, with its consent, which would make it an unauthorized person to procure any loan from the bank. Italian v. Bank, 104 Ill. 67; 1893 Ill. 67.

Illinois, 127 Ill. 324.

From the evidence it appears that the Peoples Securities Company was organized sometime in the latter part of 1929, and opened its offices on the first floor of the same building in which the defendant was located on or about January 1, 1930. The facts in evidence show that the defendant company had attempted to negotiate its first deposit from its regular banking business. A number of officers of the Peoples Securities Company were, or had been, officers of the bank. A number of the employees of the bank were transferred to and employed by the Peoples Securities Company. The bank proper occupied the premises on the ground floor of the building located at the corner of Michigan Avenue and Washington Street in the city of Chicago. A main entrance to this building was next door to the bank entrance and persons entering the building at the main entrance entered a corridor which extended around the bank and out upon Washington Street, a side street intersecting Michigan Avenue. There was an exit at the rear of the bank on to this street and directly opposite was an entrance off the same corridor to the offices of the Peoples Securities Company, which was in the same building, but whose main entrance was on Washington Street. There appears to have been a sign over the door on Washington Street which read: "Peoples Securities Company." There was also a similar sign over the corridor entrance. In other words, employees of the bank or its persons could pass directly from the bank to the Peoples Securities Company by crossing the corridor, without leaving the building. It appears that the loan to the premises occupied by

both the bank and the Peoples Securities Company was in the name of the bank. At the time the Peoples Securities Company began to do business, the bank assigned a portion of the premises to the Peoples Securities Company, but this assignment or sublease was never assented to nor received the approval of the owners of the building or its agents. While it may be true that the bank and the Peoples Securities Company were separate and distinct entities, nevertheless, there appears to have been a close cooperation and mutual business relation existing between them.

At the time plaintiff purchased the 63rd and Fairfield bond, he was given a receipt by Keefer which bore at the top the legend:

"Peoples Securities Company,
Michigan Avenue at Washington Street,
Chicago
Phone Randolph 8800."

The circular which was introduced in evidence and which plaintiff testified he received at the time of his purchase bore on its back the following statement in large print:

"Since 6 $\frac{1}{2}$ % is a very attractive yield for a conservative investment at the present time, good business judgment should lead our customers to select one or more of these bonds at once. *** "

Underneath this statement was the legend:

"Peoples Trust and Savings Bank of Chicago,
Real Estate Loan Department,
Michigan Boulevard at Washington Street."

From the receipt, one purchasing the bond might infer that he was buying from the Peoples Securities Company. From the circular the purchaser could just as well infer that he was buying as one of its customers from The Peoples Trust and Savings Bank. While the address given at the top of the receipt of the Peoples Securities Company was Michigan Avenue at Washington Street, the fact remains

both the bank and the Peoples Securities Company was in the name of the bank. At the time the Peoples Securities Company began to do business, the bank assigned a portion of the premises to the Peoples Securities Company, but this assignment or sublease was never assented to nor received the approval of the owners of the building or its agents. While it may be true that the bank and the Peoples Securities Company were separate and distinct entities, nevertheless, there appears to have been a close cooperation and mutual business relation existing between them.

At the time plaintiff purchased the bond and paid for it, he was given a receipt by Keeler which bore at the top the

"Peoples Securities Company,
Michigan Avenue at Washington Street,
Chicago
Phone Randolph 2800."

The circular which was introduced in evidence and which plaintiff testified he received at the time of his purchase bore on its back the following statement in large letters:

"There is a very attractive yield for a security -
five investment at the present time, good business judgment
should lead one to select one or more of these
bonds at once."

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Real Estate Loan Department,
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that its correct address was Washington Street at Michigan Avenue, if we consider its entrance and address as upon the street on to which its offices opened. On the other hand the address of the bank was Michigan Avenue at Washington street, which was correct, and was the entrance through which the plaintiff passed at the time he made his purchase.

There is no evidence in the record which shows that the plaintiff was at any time upon the premises of the Peoples Securities Company. If, as a matter of fact, he did as he testified - purchased his bond in the quarters of the bank from Keefer whom he had known as an employee of that institution and through whom he had made other purchases from the bank - he had a right to rely upon the fact that Keefer was the banks agent and the question as to whether or not he was put upon inquiry by reason of the acceptance of the receipt and any other facts in evidence, was for the jury.

If the bank permitted Keefer to transact business upon its premises and to hand out circulars with its name attached describing the bond in question, together with its recommendation to customers to purchase as shown by the circular, it would be estopped to deny its responsibility if a customer was misled by reason of its action. These were questions of fact which were properly submitted to the jury.

There was no error in permitting proof of other transactions with Keefer at the bank. It had a direct bearing on the question of plaintiff's right to regard him as still an employee of the bank. Nor was there any error in admitting the circular in evidence, inasmuch as the plaintiff's testimony was to the effect that he had received it upon the premises of the bank from a person whom he presumed to be its agent.

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There is no evidence in the record which shows that the plaintiff was at any time upon the premises of the Peoples Securities Company. It, as a matter of fact, he did as he testified - purchased his bond in the quarters of the bank from Keeler whom he had known as an employee of that institution and through whom he had made other purchases from the bank - he had a right to rely upon the fact that Keeler was the bank's agent and the question as to whether or not he was put upon inquiry by reason of the assistance of the receipt and any other facts in evidence, was for the jury.

If the bank permitted Keeler to transact business upon its premises and to hand out circulars with its name attached describing the bond in question, together with its recommendation to customers to purchase as shown by the circular, it would be estopped to deny its responsibility if a customer was misled by reason of its action. These were questions of fact which were properly submitted to the jury.

There was no error in permitting proof of other transactions with Keeler at the bank. It had a direct bearing on the question of plaintiff's right to regard him as still an employee of the bank. For this reason and since in plaintiff's affidavit in evidence, inasmuch as the plaintiff's testimony was to the effect that he had received it upon the premises of the bank from a person whom he presumed to be its agent.

Whether or not plaintiff tendered back the bonds within a reasonable time was one of fact for the jury. Plaintiff's testimony was to the effect that he did not discover the fraud until September, 1932, when default was made in the interest payments. The delay between the time of his discovery of the fraud and his tender in October 1932, was not of such great length as to make the question of laches or delay one of law.

We find no error in the record which would justify a reversal and for that reason and the reasons expressed in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

...that it was not until the 10th of July that the ...
...time was not ... for the ...
...to the ... that he did not discover the ... until ...

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JUDGMENT AFFIRMED.

RECEIVED, C. L. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

37770

EDWARD H. MORRIS, Receiver of the
Binga State Bank, a corporation,

Appellee,

v.

JOHN W. BARNES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 646¹

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal to reverse a judgment of the Municipal Court of Chicago entered upon the verdict of the jury in the sum of \$2,123.68. The suit was instituted by Edward H. Morris, Receiver of the Binga State Bank, based upon a promissory note executed by the defendant in favor of the bank and dated June 12, 1930. The judgment note contained the usual clause permitting the entry of judgment, which was done, and on motion the defendant was permitted to enter his appearance, plead and defend. The questions of fact surrounding the issuance of the note were submitted to a jury.

The defendant takes the position in this court that having denied the execution of the note under oath, the burden was upon the plaintiff to prove its execution, and further that Binga, president of the bank, was guilty of fraud in the procurement of the note and the receiver occupies no better position than did the Binga State Bank.

From an examination of the evidence we find that there is ample proof tending to support the fact that the note was in fact executed by the defendant.

Morris, the receiver, testified that about two months after his appointment as receiver of the Binga State Bank, he talked with the defendant and was told by him that the note in question was all right and defendant admitted signing it. The defendant, himself, in the course of his testimony confirms this fact by acknowledging that

EDWARD H. MORRIS, Receiver of the
Chicago State Bank, a corporation,
Plaintiff,

vs.

JOHN A. MORRIS,
Defendant.

Appeal from the
Circuit Court of Cook County,
Illinois.

379 I.A. 646

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.
This is an appeal to reverse a judgment of the Municipal
Court of Chicago entered upon the verdict of the jury in the sum
of \$2,123.88. The suit was instituted by Edward H. Morris, Receiver
of the Chicago State Bank, based upon a promissory note executed by
the defendant in favor of the bank and dated June 12, 1930. The
judgment note contained the usual clause permitting the entry of
judgment, which was done, and on motion the defendant was permitted
to enter his appearance, plead and defend. The questions of fact
surrounding the issuance of the note were submitted to a jury.
The defendant takes the position in this court that having
denied the execution of the note under oath, the burden was upon the
plaintiff to prove its execution, and further that King, president
of the bank, was guilty of fraud in the procurement of the note and
the receiver occupies no better position than did the Chicago State
Bank.
From an examination of the evidence we find that there is
ample proof tending to support the fact that the note was in fact
executed by the defendant.
Morris, the receiver, testified that about two months after
his appointment as receiver of the Chicago State Bank, he talked with
the defendant and was told by him that the note in question was all
right and defendant admitted signing it. The defendant, himself, in
the course of his testimony admitted that he was not

he signed the note, but attempted to avoid on the ground that he did not have his glasses with him and relied upon the statements of Binga, president of the bank.

The question of fraud in the procurement of the instrument was submitted to the jury and we see no reason for disturbing its verdict nor the judgment entered thereon.

Objection is also made to the giving of certain instructions on behalf of the plaintiff. We have examined these instructions and find there is no error which would require a reversal of the judgment.

The defendant introduced evidence for the purpose of showing that he was ignorant and unused to business practices and did not possess sufficient knowledge of affairs to cope with the blandishments of Binga, president of the bank, and was thereby induced to do something in the signing of the note, which he otherwise would not have done if he had the requisite business experience. On cross-examination he was asked certain questions in regard to his financial transactions and from this it appears that he was not only well versed in transactions in real estate and the signing of notes, but that he had secured patents, recovered judgments at law, dealt in cashier's checks and was familiar with mortgages and mortgage transactions. It is insisted that this cross-examination was error in that it was an attempt to disclose the financial situation of the defendant and thus prejudice him in the eyes of the jury. It is apparent from a reading of the evidence that it was attempted by the defendant to elicit the sympathy of the jury because of his poverty and ignorance concerning business transactions. By his testimony he opened the door to the cross-examination that followed. Where one opens the door in chief, great latitude is allowed on cross-examination. The cross-examination was not for the purpose of showing his financial worth, but rather to overcome his defense of ignorance and lack of understanding.

We see no reason for reversing the judgment and for the reasons

He signed the note, but attempted to avoid on the ground that he did not have his glasses with him and relied upon the statements of Kings, president of the bank.

The question of fraud in the procurement of the instrument

was submitted to the jury and we see no reason for disturbing the

verdict nor the judgment entered thereon.

Objection is also made to the giving of certain instructions

on behalf of the plaintiff. We have examined these instructions and find there is no error which would require a reversal of the judgment.

The defendant introduced evidence for the purpose of showing

that he was ignorant and unable to business practices and did not

possess sufficient knowledge of affairs to cope with the business of Kings, president of the bank, and was thereby induced to do something

in the signing of the note, which he otherwise would not have done if he

had the requisite business experience. On cross-examination he was

asked certain questions in regard to his financial transactions and was

this it appears that he was not only well versed in transactions in

real estate and the signing of notes, but that he had secured property

recovered judgments at law, dealt in coachmen's chairs and was familiar

with mortgages and mortgage transactions. It is insisted that this

cross-examination was error in that it was an attempt to disclose the

financial situation of the defendant and thus prejudice him in the eyes

of the jury. It is apparent from a reading of the evidence that it was

attempted by the defendant to elicit the sympathy of the jury because

of his poverty and ignorance concerning business transactions. By his

testimony he opened the door to the cross-examination that followed.

There was no error in chief, great latitude is allowed on cross-

examination. The cross-examination was not for the purpose of showing

his financial worth, but rather to overcome his defense of ignorance and

lack of understanding.

We see no reason for reversing the judgment and for the reasons

expressed in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

expressed in this opinion, the judgment of the Municipal Court is
affirmed.

JUDGMENT AFFIRMED.

KIRBY, P. J. AND HALL, J. CONCUR.

37808

IN THE MATTER OF THE ESTATE OF
ANNA MILLER, Deceased,

Petitioner - Appellee,

v.

ON APPEAL OF WILLIAM LAZARSKI,

Respondent - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

279 I.A. 646²

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Frank Lazarski, administrator of the estate of Anna Miller, deceased, filed his petition in the Probate Court of Cook County, praying for an order on the respondent, William Lazarski, to turn over a certain mortgage, together with the mortgage notes secured thereby, and a real estate bond in the sum of \$500.00, claiming that they belonged to the estate.

William Lazarski defended on the ground that both these evidences of indebtedness had been given to him as a gift by the deceased prior to her death.

The Probate Court found in favor of the administrator and an appeal was taken to the Circuit Court of Cook County. Evidence was heard upon the trial in the Circuit Court and a judgment order entered in favor of the estate. The cause was tried by the court without a jury and in view of the fact that the cause will have to be reversed, it would be useless to discuss the evidence in detail.

During the course of the proceedings in the Circuit Court the defendant introduced two witnesses, Berenice Lazarski, aged 19 years, a daughter of the respondent and a niece of the deceased, Anna Miller, and Edward Lazarski, aged 18 years a son of the respondent and a nephew of the deceased, Anna Miller.

The court heard the offer of proof made by counsel for the respondent as to what these witnesses would testify to and to

27502

IN THE MATTER OF THE ESTATE OF
ANNA MILLER, Deceased,

Petitioner - Appellee,

v.

ON APPEAL OF WILLIAM LASKARSKI,

Respondent - Appellant.

APPEAL FROM

Circuit Court

COOK COUNTY,

27511 A. 846

MR. JUSTICE ALBION KELLIVENT THE CHIEF OF THE COURT.

FRANK LASKARSKI, administrator of the estate of Anna Miller, deceased, filed his petition in the Probate Court of Cook County, praying for an order on the respondent, William Laskarski, to turn over a certain mortgage, together with the mortgage notes secured thereby, and a real estate bond in the sum of \$500.00, claiming that they belonged to the estate.

WILLIAM LASKARSKI defended on the ground that both these evidences of indebtedness had been given to him as a gift by the deceased prior to her death.

The Probate Court found in favor of the administrator and an appeal was taken to the Circuit Court of Cook County.

Evidence was heard upon the trial in the Circuit Court and a judgment order entered in favor of the estate. The cause was tried by the court without a jury and in view of the fact that the cause will have to be reversed, it would be useless to discuss the evidence in detail.

During the course of the proceedings in the Circuit Court the defendant introduced two witnesses, Bernice Laskarski, aged 13 years, a daughter of the respondent and a niece of the deceased, Anna Miller, and Edward Laskarski, aged 18 years a son of the respondent and a nephew of the deceased, Anna Miller.

The court heard the offer of proof made by counsel for the respondent as to what these witnesses would testify as to the

a limited extent, over objection, heard their testimony in chief. Both of these witnesses testified to the fact that the documents had been given to the respondent prior to the death of the deceased and that at the time she stated that she was giving them to the respondent as a present because of the length of time she had lived at their home. Other testimony material to the issue was produced by these witnesses and at the conclusion the court sustained a motion to strike it from the record on the ground that these witnesses were interested and, therefore, not qualified to testify. In this the court committed error.

The test of interest which determines the competency of a witness is as to whether or not the witness will gain or lose as a direct result of the suit and this interest must be certain, direct and immediate. Brownlie v. Brownlie, 351 Ill. 72.

The Supreme Court of this state in the case of Boyd v. Boyd, 163 Ill. 611, in its opinion says:

"Alexander Boyd and Wilson M. Boyd are the sons of James Boyd, deceased, and of Anna Boyd, and Jane Biggs is the daughter of Anna Boyd by a former husband. The claim is, they were not competent witnesses for the same reason their mother was incompetent, for, it is said, the establishment of a trust in favor of Anna Boyd would inure to their benefit as her prospective heirs. But this interest is too remote and uncertain to render them incompetent, for their mother may dispose of the property before she dies, or she may out-live her children."

In the case at bar the witnesses, although children of the respondent, had no direct or immediate interest in the result of the litigation. We do not believe that the interest necessary to disqualify them was present in this case or was such as was intended by the statute. The court was in error in striking their testimony from the record and in refusing to consider it on the hearing of the cause.

For the reasons and grounds expressed in this opinion, the judgment order of the Circuit Court is reversed and the cause is remanded for a new trial.

JUDGMENT ORDER REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

a limited extent, over objection, heard their testimony in chief. Both of these witnesses testified to the fact that the documents had been given to the respondent prior to the death of the deceased and that at the time she stated that she was giving them to the respondent as a present because of the length of time she had lived at their home. Other testimony material to the issue was produced by these witnesses and at the conclusion the court announced a motion to strike it from the record on the ground that these witnesses were interested and, therefore, not qualified to testify. In this the court committed error.

The test of interest which determines the competency of a witness is as to whether or not the witness will gain or lose as a direct result of the suit and this interest must be certain, direct and immediate. Howell v. Howell, 231 Ill. 75.

The Supreme Court of this state in the case of Howell v. Howell, 105 Ill. 511, is the relation says:

"Alexander Howell and Wilson E. Howell are the sons of James Howell, deceased, and of Anna Howell, and Jane Riggs is the daughter of Anna Howell by a former husband. The claim is, they were not legitimate children for the same reason. They were illegitimate, for, it is said, the establishment of a trust in favor of them had been made by their mother as her own separate estate. But this interest is too remote and uncertain to qualify them to testify. For their mother was illegitimate, and illegitimate parents are not, in our view, competent to testify. In the case at bar the witnesses, although children of the respondent, had no direct or immediate interest in the result of the litigation. We do not believe that the interest necessary to disqualify them was present in this case or was such as was intended by the statute. The court was in error in striking their testimony from the record and in refusing to consider it on the hearing of the cause. For the reasons and grounds expressed in this opinion, the judgment order of the Circuit Court is reversed and the cause is remanded for a new trial."

37826

HELEN S. MAGNUS, Administratrix, etc.,

Appellee,

v.

KATHERINE SWARTZ and BERNARD J. BROWN,

(Defendants).

On appeal of

BERNARD J. BROWN,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

279 I.A. 646³

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court finding one Bernard J. Brown in contempt of court for failure to comply with an order to turn over money in his possession to the plaintiff within 30 days from the date of the entry of the decree or order.

From the facts it appears that there were two brothers, Adolph and Ignatz Swartz. Adolph Swartz died and one Katherine Swartz, his wife, was appointed administratrix of his estate. As administratrix she obtained possession of certain promissory notes and securities which had been pledged with the Broadway Trust & Savings Bank but which in fact were afterwards found to be the property of Ignatz Swartz. These notes and securities were not listed or inventoried in the estate of Adolph Swartz. About a year after the death of Adolph Swartz, Ignatz Swartz died and one Carl Hansen was appointed as administrator to collect. The Probate Court, and later the Circuit Court, found that these promissory notes and securities were, in fact, the property of Ignatz Swartz and, therefore, belonged to his estate. An appeal was taken from this order to the Supreme Court on the ground that a constitutional question was involved and the case is found reported in Hansen v. Swartz, 345 Ill. 609. The court in its opinion in that case held that the action was brought against

WILLIAM E. SWARTZ, Plaintiff,
vs.
KATHERINE SWARTZ and BERNARD L. BROWN,
Defendants.

v.

KATHERINE SWARTZ and BERNARD L. BROWN,
Defendants.

An appeal of

BERNARD L. BROWN,

Appellant.

SIXTH JUDICIAL DISTRICT

DEER COUNTY.

279 I.A. 646

THE JUSTICE OF THE PEACE FOR THE COUNTY OF DEER

This is an appeal from an order of the Circuit Court finding one Bernard L. Brown in contempt of court for failure to comply with an order to turn over money in his possession to the plaintiff within 30 days from the date of the entry of the decree or order. From the facts it appears that there were two brothers, Adolph and Ignatz Swartz. Adolph Swartz died and one Katherine Swartz, his wife, was appointed administratrix of his estate. His estate was the subject of a judgment of the Circuit Court in a partition action in which it had been adjudged with the Broadway Trust & Savings Bank that which in fact were afterwards found to be the property of Ignatz Swartz. These notes and securities were not listed on inventory in the estate of Adolph Swartz. About a year after the death of Adolph Swartz, Ignatz Swartz died and one Carl Hansen was appointed as administrator to collect. The Probate Court, and later the Circuit Court, found that these promissory notes and securities were, in fact, the property of Ignatz Swartz and, therefore, belonged to his estate. An appeal was taken from this order to the Supreme Court on the ground that a constitutional question was involved and the case is now pending in Hansen v. Swartz, 279 I.A. 646. The court in its opinion in that case held that the action was brought against

Katherine Swartz, individually, and not as administratrix, and that, therefore, there were others as heirs not made parties who had an interest in the litigation and reversed the judgment.

The defendant here, Bernard J. Brown, was the attorney of record in the appeal to the Supreme Court and the proceedings prior thereto in the Probate and Circuit Courts and as such attorney represented Katherine Swartz, so that he was well informed as to the claim of the estate of Ignatz Swartz to the promissory notes and securities. This defendant now appears in this proceeding as attorney Pro Se.

This proceeding was started in the Probate Court under sections 81 and 82 of the Administration Act against the defendant on the theory that he held assets of the estate which he had converted to his own use and which he refused to deliver up to the estate of Ignatz Swartz. Under this proceeding the defendant was found to have such assets and was ordered to turn them over, and from that order defendant appealed to the Circuit Court. The cause was heard in the Circuit Court and an order entered finding that the defendant Brown received from Katherine Swartz, as administrator of the estate of Adolph Swartz, Deceased, certain negotiable papers on which he had collected the sum of \$1,753.09, out of which he had paid for court costs and expenses in litigation concerning the ownership of said assets, the sum of \$116.58, leaving a balance of \$1,636.51, which should be turned over to Helen S. Magnus, administratrix of the estate of Ignatz Swartz within 30 days from the date of the order.

The defendant having failed to turn over or account for the property or the money, on February 13, 1934, was required to show cause why he should not be attached for contempt for failure to comply with said order. Defendant answered and alleged that he had expended \$716 in actual costs in defending the case of the administratrix of the estate of Ignatz Swartz against the estate of Adolph Swartz and that

Katherine Swartz, individually, and not as administratrix, and that, therefore, there were others as being not made parties who had an interest in the litigation and reversed the judgment.

The defendant here, Bernard J. Brown, was the attorney of record in the appeal to the Supreme Court and the proceedings prior thereto in the Probate and Circuit Courts and as such attorney represented Katherine Swartz, so that he was well informed as to the claim of the estate of Ignatz Swartz to the monies in notes and accounts. This defendant now appears in this proceeding as attorney for the estate.

This proceeding was started in the Probate Court under sections 81 and 82 of the Administration Act against the defendant on the theory that he held assets of the estate which he had converted to his own use and which he refused to deliver up to the estate of Ignatz Swartz. When this proceeding was commenced the defendant was found to have such assets and was ordered to turn them over, and from that order defendant appealed to the Circuit Court. The cause was heard in the Circuit Court and an order entered finding that the defendant Brown received from Katherine Swartz, as administratrix of the estate of Adolph Swartz, deceased, certain negotiable papers on which he had collected the sum of \$1,753.92, out of which he had paid for court costs and expenses in litigation concerning the ownership of said assets, the sum of \$116.52, leaving a balance of \$1,637.40, which should be turned over to Helen E. Magnus, administratrix of the estate of Ignatz Swartz, which is the sum of the estate.

The defendant having failed to turn over or account for the property or the money, on February 12, 1904, was required to show cause why he should not be attached for contempt for failure to comply with said order. Defendant answered and alleged that he had expended \$116 in actual costs in defending the case of the administratrix of the estate of Ignatz Swartz against the estate of Adolph Swartz and that

he did not have the securities, nor moneys on hand sufficient to satisfy the order and that he had no money or property of any kind with which to satisfy said finding.

July 12, 1934, the matter being submitted on the record, the court found the defendant had failed to pay the sum of \$1,636.51, and had wilfully and contumaciously refused and still refuses to pay said sum or any part thereof and, therefore, is in contempt of court, and it was ordered that he should be committed to the County Jail until said sum was paid or until he should be otherwise purged of contempt.

The order provided that the commitment should not continue for more than six months from the date of the order and, in view of the fact that that time has expired by reason of this appeal, we are asked under an assignment of cross-error to correct the order so that the duration of imprisonment should read: As from the first day of imprisonment or unless the defendant shall sooner satisfy the claim.

But two points are raised by the brief of defendant, under which a reversal of the order of the Circuit Court is sought. It is insisted that the court had no power to enforce the payment, first, because it was not shown that the failure to comply with the order was wilful or contumacious; and second, because of the fact that the answer denies respondent's ability to comply with the order, for lack of funds. No demand for a jury was made and consequently that question is not here for consideration.

Sections 81 and 82 of the Administration Act, as amended, gives the right to the administrator to take the necessary steps to discover assets. This question has been passed upon in the case of People ex rel Olsen v. Templeman, 265 Ill. App. 369, wherein the court announces its views as follows:

"Section 81 and 82 of the Administration Act, as

he did not have the securities, nor money on hand sufficient to satisfy the order and that he had no money or property of any kind with which to satisfy said finding.

July 12, 1934, the matter being submitted on the record, the court found the defendant had failed to pay the sum of \$1,836.51, and had wilfully and contumaciously refused and still refuses to pay said sum or any part thereof and, therefore, is in contempt of court, and it was ordered that he should be committed to the County Jail until said sum was paid or until he should be otherwise purged of contempt.

The order provided that the commitment should not continue for more than six months from the date of said order and, in view of the fact that that time has expired by reason of this appeal, we are asked under an assignment of cross-error to correct the order so that the duration of imprisonment should read: "as from the first day of imprisonment or unless the defendant shall sooner satisfy the claim."

But two points are raised by the brief of defendant, under which a reversal of the order of the Circuit Court is sought. It is insisted that the court had no power to enforce the payment, first, because it was not shown that the failure to comply with the order was wilful or contumacious; and second, because of the fact that the answer denies respondent's ability to comply with the order, for lack of funds. We think for a jury was made and accordingly that question is not here for consideration.

Sections 81 and 82 of the Administration Act, as amended, gives the right to the administrator to take the necessary steps to discover assets. This question has been passed upon in the case of People ex rel O'Leary v. Tammam, 208 Ill. App. 159, wherein the court announces its views as follows:

"Section 81 and 82 of the Administration Act, as

amended, give authority to any 'person interested in the estate' to bring the proceedings provided for, and administrators de bonis non are, we think, such persons. The finding is that respondent converted the property of this estate to his own use. The proceeding was therefore not one merely for the collection of a debt, which would violate the rule announced in Johnson v. Nelson, 341 Ill. 119, and while it must be conceded that prior to the amendment of these sections the proceeding could not have been maintained under the rule laid down in Moore v. Brandenburg, 348 Ill. 232, and other cases cited, the amendment to these sections extending the jurisdiction of the probate court to cases of this kind and granting the right of trial by jury, has removed that objection."

The proceeding before us is not one to collect a debt nor is the property claimed as a gift. It is admitted by the answer of the respondent that he received the property and had it in his possession or the proceeds therefrom. Moreover, it would be impossible for him to take the position that it was a gift as he is bound by his knowledge as attorney during the course of all the proceedings that the property which he held was claimed by the estate of Ignatz Swartz and always had been so claimed from the time that he originally obtained possession. The claim that he utilized the proceeds of this property in the fighting of the claim does not justify him in his position in the present proceeding. Anything he did with the property after notice was at his peril. It is a well settled doctrine of equity jurisprudence that a constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it. Bank of Williston v. Alderman, 106 S. C. 386. The mere fact that his client, Katherine Swartz, as administrator of the estate of Adolph Swartz, failed to inventory this property in the estate of Adolph Swartz, while the defendant was acting as her counsel, is evidence of the fact that it was known by the defendant that it was not equitably the property of the estate of Adolph Swartz.

There is sufficient evidence in the record to justify

included, give authority to any person interested in the estate, to bring the proceedings provided for, and administrators in this case, as shown by the record, the issue is a proper one to be raised in this case. The proceeding was therefore not one merely for the collection of a debt, which would violate the rule announced in Johnson v. Johnson, 241 Ill. 112, and which it must be conceded that prior to the amendment of these sections the proceeding would not have been sustained under the rule laid down in Moore v. Henderson, 241 Ill. 332, and other cases. The amendment to these sections extending the jurisdiction of the probate court to cases of this kind and granting the right of trial by jury, has removed that objection."

The proceeding before us is not one to collect a debt

nor is the property claimed as a gift. It is admitted by the answer of the respondent that he received the property and had it in his possession or the proceeds therefrom. Moreover, it would be impossible for him to deny the position that it was a gift as he is bound by his knowledge as attorney during the course of all the proceedings that the property which he held was claimed by the estate of Ignatz Swartz and always had been so claimed from the time that he originally obtained possession. The claim that he utilized the proceeds of this property in the lighting of the claim does not justify him in his position in the present proceeding. Anything he did with the property after notice was at his peril. It is a well settled doctrine of equity jurisprudence that a constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it. Bank of Montreal v. Albany, 106 N. D. 280. The mere fact that his client, Katherine Swartz, as administrator of the estate of Adolph Swartz, failed to administer this property in the estate of Adolph Swartz, while the defendant was acting as her counsel, is evidence of the fact that it was known by the defendant that it was not rightfully the property of the estate of Adolph Swartz.

There is sufficient evidence in the record to justify

the court in holding that the property was wilfully and contumaciously held by defendant in defiance of its orders. It is true that Brown was not acting as attorney for the estate of Ignatz Swartz, but he still occupied a position adverse to that estate with full knowledge of the facts and, in our opinion, became a trustee of the property or funds in his possession which he should account for upon the final determination of the cause. When it originally came into his hands from the administrator of the estate of Adolph Swartz, he accepted it as a trust, and subsequent payments to himself as fees therefrom were at his peril. People v. Zimmer, 238 Ill. 607; Wise v. Chaney, 67 Ia. 73; Rohn v. Rohn, 204 Ill. 184.

Defendant in his amended answer for a rule to show cause states that he did not have in his possession at any time since January 1, 1933, any of such moneys nor any other money in excess of \$100 at any one time and had no money or property at the time the decree was entered and that his failure to comply with the decree is not contumacious, but due to his inability so to do. We are satisfied from the record in this case that if the defendant did not have the money, it was because he has wilfully parted with it and has used it for his own purposes. Inability to pay because of lack of funds does not avail where such lack of funds is due to the wrongful act of the party who had them in his possession. People v. Zimmer, 238 Ill. 607.

If a defendant should be released upon an answer as meager as the one in the record in this proceeding, there would be no redress to the estate. The Supreme Court of Iowa in the case of Wise v. Chaney, 67 Ia. 73, cited by the Supreme Court of this state in the case of People v. Lamothe, 331 Ill. 351, in its opinion said:

"His other excuse, that he had no money of his own in his possession, will not do. It would be a convenient way, if this excuse should be regarded as sufficient, for one required to surrender money or property of an estate, to divest himself thereof, and thus defeat the order of the court and justice."

the court in holding that the property was willfully and consciously
held by defendant in defiance of its orders. It is true that Brown
was not acting as attorney for the estate of Leta Swartz, but he
still occupied a position adverse to that estate with full knowledge
of the facts and, in our opinion, became a trustee of the property
or funds in his possession which he should account for upon the
final determination of the cause. When it originally came into his
hands from the administrator of the estate of Leta Swartz, he
accepted it as a trust, and subsequent payments to himself as fees
therefrom were at his peril. People v. Kinnear, 238 Ill. 307; Wiss
v. O'Harney, 67 Ia. 73; John v. John, 304 Ill. 184.

Defendant in his amended answer for a rule to show cause
states that he did not have in his possession at any time since
January 1, 1927, any of such money nor any claim money in connection
of \$100 at any one time and had no money or property at the time the
decree was entered and that his failure to comply with the decree is
not contumacious, but due to his inability so to do. We are satisfied
from the record in this case that if the defendant did not have the
money, it was because he has willfully parted with it and has used it
for his own purposes. Inability to pay because of lack of funds does
not avail where such lack of funds is due to the wrongful act of the
party who had then in his possession. People v. Kinnear, 238 Ill. 307.
If a defendant should be released upon an answer as meager
as the one in the record in this proceeding, there would be no redress
to the estate. The Supreme Court of Iowa in the case of Wiss v.
O'Harney, 67 Ia. 73, cited by the Supreme Court of this state in the
case of People v. Kinnear, 238 Ill. 307, in its opinion said:
"His answer states, that he had no money or his own in his
possession, will not do. It would be a convenient way
if this excuse should be regarded as sufficient for one
refused to surrender money or property of an estate, to
divest himself thereof, and thus defeat the order of the
court and justice."

In Tindall v. Nisbet, 113 Ga. 1114, the court said:

"Finally it is said that there should be a discharge of this prisoner, because he testifies that he cannot pay the sum required of him or comply with the order of the court. There is no explanation of what he has done with the money, but only the bald statement that he is unable to pay it. Shall receivers, sheriffs, and attorneys, who have funds entrusted to their care, be discharged by merely saying that they have spent the money which did not belong to them, and cannot pay? Surely not. To wrongfully place one's self in such a position gives no right of discharge."

In the case of Barclay v. Barclay, 184 Ill. 471, the court in its opinion, said:

"It is finally urged, with much earnestness, that the facts shown upon the hearing did not justify the order of the court, but that the defendant sufficiently established his inability to perform the decree to entitle him to his discharge. With this contention we cannot agree. On the contrary, his own affidavit clearly shows that he has persistently and repeatedly refused to make payments in performance of the decree when he had the ability to do so, choosing to spend large sums of money in resisting payments rather than to apply the same in the discharge of his liability. He, as appears from his own showing, seems to have acted upon the theory that he was justified in spending the whole of his salary, amounting to \$125 per month, for his own support and that of his minor son, and in fruitless litigation to escape the performance of the decree for the maintenance of his wife and daughter, leaving them without any support whatever."

In the case of Harrigan v. Stone, 237 Ill. App. 314, the court said:

"It is insisted that the injunction issued by the court prevented Harrigan from raising any money to comply with the decree. There is nothing in the record to indicate his inability financially to comply with the decree. The burden is upon the person charged with contempt to prove his inability to comply with the order or decree, by definite and explicit evidence. Shaffner v. Shaffner, 212 Ill. 492; People v. Zimmer, 238 Ill. 607."

A defendant in a proceeding such as this should be required to make a much better showing, either by proof or by his answer, of his inability to pay than has been done in the case at bar. In spite of his contention that he is without funds, it appears that he is able to procure an appeal bond in the sum of \$2,000. No attempt appears to have been made to give the court either by answer or proof any

In *Tinsell v. Weber*, 115 Cal. 1114, the court said:

[illegible]

In the case of *Barclay v. Barclay*, 184 Ill. 471, the court

ni et nunc poine

"It is finally urged, with much emphasis, that I have shown upon the hearing did not justify the order of the court, but that the defendant sufficiently established his inability to perform the service to entitle him to his discharge. With this contention we cannot agree. On the contrary, his own admission clearly shows that he was permanently and irretrievably unable to work because of deterioration of the disease which he had the ability to do so, claiming to spend large sums of money in visiting physicians rather than to apply the care in the discharge of his liability. He appears from his own evidence, however, to rest upon one theory that he was qualified in speaking the whole of the salary amounting to \$188 per month, for his own support and that of his minor son, and in truthfulness it seems the performance of the service for the maintenance of his wife and daughter, leaving them without any means whatever."

In the case of Williams v. Brown, 227 Ill. App. 3d 108

: 5200 31000

"It is insisted that no intention formed by the above
reverted Harlan's true feeling my money to occupy his
the device. There is nothing in the record to indicate his
immediately financially to comply with the decree. The burden
is upon the person charged with contempt to prove his in-
ability to comply with the order or decree, by definite and
convincing evidence. In re, Hartman; 107 Cal. 698; 107

A defendant in a proceeding upon a writ should be permitted

to have been able to give the court either by direct or cross
examination an appeal bond in the sum of \$2,000. No attempt appears
of his attention that he is without funds, it appears that he is able
his inability to pay than has been done in the case at bar. In spite
to make a much better showing, either by proof or by his answer, of

detailed statement of his financial position and we do not believe that he has by his answer sufficiently met the issue.

In view of the fact that the time has expired, under the order of the Circuit Court, during which the defendant should be required to repay to the estate of Ignatz Swartz the money found due the assignor on penalty, the error assigned by plaintiff will be sustained and an order entered here carrying out the purpose and intent of the order of the Circuit Court.

We are of the opinion that the order finding the respondent guilty of contempt of court was proper and the order is affirmed and the order of the Circuit Court corrected so as to read as follows:

It is ordered that Bernard J. Brown be committed to the County Jail of Cook County, Illinois, until he shall have paid the sum of \$1,636.51, but not, however, for a period of over 6 months from the day of his commitment.

For the reasons expressed in this opinion the order of the Circuit Court finding the defendant guilty of contempt is affirmed and the order of commitment is corrected in accordance with the views hereinbefore expressed.

JUDGMENT AFFIRMED AS CORRECTED.

HEBEL, F.J. AND HALL, J. CONCUR.

that detailed statement of his financial position and he do not believe that

he has by his answer sufficiently met the issue.

In view of the fact that the time has expired, under the

order of the Circuit Court, during which the defendant should be

required to repay to the estate of Ignatz Swartz the money found due

the assignor on penalty, the order assigned by plaintiff will be

sustained and an order entered here carrying out the purpose and

intent of the order of the Circuit Court.

We are of the opinion that the order finding the respondent

guilty of contempt of court was proper and the order is affirmed

and the order of the Circuit Court corrected so as to read as

follows:

It is ordered that Edward J. Swartz be committed to the

County Jail of Cook County, Illinois, until he shall have paid the

sum of \$1,038.51, but not, however, for a period of more than

from the day of his commitment.

For the reasons expressed in this opinion the order of

the Circuit Court finding the defendant guilty of contempt is

affirmed and the order of commitment is entered in accordance with

the above recommendations.

TESTED AND ENTERED IN COURT.

HENRY, J. J. AND WILL, J. J.

37856

CLARK - RANDOLPH BUILDING CORPORATION,)

(Plaintiff) Appellee,

v.

MARY BELLE SPENCER, et al,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

279 I.A. 646⁴

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for possession in an action in forcible entry and detainer against the defendants. From this judgment the defendant appealed. A motion was made to dismiss the appeal, which was reserved to the hearing. The record shows that the defendants failed to file their notice of appeal within 30 days from the rendition of the judgment and failed to follow out such subsequent steps as service of a copy of any notice of appeal.

Defendants contend that the Civil Practice Act now in effect does not apply to actions of forcible entry and detainer. This question was squarely passed upon in the case of Vaach v. Hendricks, 278 Ill. App. 376, which was an action in forcible entry and detainer. An appeal bond was filed in that case as was done here, but the court held that the filing of the notice of appeal was jurisdictional and that the proceedings in the lower court could not be reviewed unless such was done. In the case of Vaach v. Hendricks, supra, the motion to ~~strike~~ the cause from the docket of the Appellate Court was allowed. We have examined the facts in the case before us, however, on the merits and find that the judgment of the trial court was proper.

The lease introduced in evidence, under which the defendants claim possession, was for a period of 4 months. It expired April

MUNICIPAL COURT

OF CHICAGO

(Plaintiff) vs. (Defendant)

378 I.A. 618

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for possession in an action in forcible entry and detainer against the defendants. From this judgment the defendant appealed. A motion was made to dismiss the appeal, which was reserved to the hearing. The record shows that the defendants failed to file their notice of appeal within 30 days from the rendition of the judgment and failed to follow out such subsequent steps as service of a copy of any notice of appeal.

Defendants contend that the Civil Practice Act now in

effect does not apply to actions of forcible entry and detainer.

This question was recently passed upon in the case of Yench v.

Hendricks, 378 Ill. App. 376, which was an action in forcible entry

and detainer. An appeal bond was filed in that case as was done here,

but the court held that the filing of the notice of appeal was

jurisdictional and that the proceedings in the lower court could

not be reviewed unless such was done. In the case of Yench v.

Hendricks, supra, the motion to strike the cause from the docket

of the Appellate Court was allowed. We have examined the facts in

the case before us, however, on the writs and find that the judg-

ment of the trial court was proper.

The lease introduced in evidence, under which the defendants

claim possession, was for a period of 6 months. It expired April

30, 1934. On May 1st, following, this action for possession was instituted and service had. Defendants insist they were entitled to a 30 day notice. The Landlord and Tenant Act, Chapter 80, Sec. 12, Cahill's Ill. Rev. St. 1933, provides:

"12. WHEN TERM EXPIRES NOTICE TO QUIT NOT REQUIRED.)

§12. When the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand of possession is necessary."

Finding no reversible error in the proceedings in the Municipal Court, the judgment of that court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J.: AND HALL, J. CONCUR.

30, 1984. On May 1st, following, this action for possession was instituted and service had. Defendants insist they were entitled to a 30 day notice. The Landlord and Tenant Act, Chapter 80, Sec. 12,

Gall's Ill. Rev. St. 1983, provides:

"12. WHEN TERM EXPIRES NOTICE TO QUIT NOT REQUIRED.
13. When the term of a lease is for a definite period, and the lease expires by the term of the lease, the tenant is not bound to surrender possession, and no notice to quit or demand of possession is necessary."

Finding no reversible error in the proceedings in the Municipal Court, the judgment of that court is affirmed.

JUDGMENT AFFIRMED.

WILLIAM F. J. AND WIFE, V. COMMISSIONER.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:
Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 646⁵

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 14 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1934.

| | | |
|-------------------------------|---|-------------------------|
| LOWELL L. JIBBEN, by his next |) | |
| friend, Orie L. Jibben, |) | |
| |) | |
| Appellee, |) | APPEAL FROM THE CIRCUIT |
| |) | |
| vs. |) | COURT OF PEORIA COUNTY. |
| |) | |
| VILLAGE OF BARTONVILLE, |) | |
| |) | |
| Appellant. |) | |

DOVE, J.

This is an action brought by appellee against the Village of Bartonville to recover damages for personal injuries. The declaration charged that on July 17, 1932 appellee was walking along a foot bridge on Bolivia Avenue, a public street in the Village of Bartonville, and while in the exercise of due care for his own safety, casually stopped and leaned lightly against the banister or railing of the bridge, causing it to give way and precipitating appellee into the gully beneath. It was averred in the declaration that the purpose of this railing was to prevent people in passing across the bridge from falling from the bridge into the gully and that it was the duty of appellant to use reasonable care and caution to maintain the bridge and railing in a reasonably safe condition so that the banister or railing would not give way. The declaration then charges that appellant did not use reasonable care and caution to maintain the railing in a reasonably safe condition but negligently and carelessly allowed the railing and uprights, to which the railing was attached, to be and remain rotten and so insecurely attached together where the

uprights joined the railing and side of the bridge that anyone passing over the bridge, exercising due care and caution for his own safety, ^{who} would strike or lean against the railing, would cause the upright to become detached from the railing and from the side of the bridge and the railing would fall into the gully. A plea of the general issue was filed and a trial had which resulted in a verdict and judgment for \$5,000.00 in favor of appellee and the record is brought to this court for review by appeal.

It is contended by appellant that the evidence discloses that it was not guilty of the negligence charged; that appellee was guilty of contributory negligence: that the trial court erred in its instructions and also in denying appellant's request to require appellee to submit to a physical examination.

The evidence discloses that Bolivia Avenue runs in an easterly and westerly direction in the Village of Bartonville and that on the north side thereof there is a ditch or gully, which also extends in an easterly and westerly direction. Collier Avenue is one block south and runs parallel with Bolivia Avenue. Taft Avenue is north of Bolivia Avenue and runs north and south, but its southerly end does not intersect with Bolivia Avenue. There is, however, a foot bridge across this gully or ditch which connects with a path which leads to the south end of Taft Avenue. Appellee is a boy, and at the time of the accident was sixteen years of age and lived at home with his parents on Collier Avenue. Between seven and seven-thirty o'clock on the evening of July 17, 1932 he left his home in company with Louis Correl, a neighbor boy twelve years old, and Parm Correl, a brother of Louis, who was about fifteen years of age, and started toward the business part of the village. They went north and when near the south line of Bolivia Avenue and a little east of the bridge, Parm stopped

upright joined the railing and side of the bridge that anyone passing over the bridge, exercising due care and caution for his own safety, would strike or lean against the railing, would ensure the upright to become detached from the railing and from the side of the bridge and the railing would fall into the gully. A plan of the general issue was filed and a trial had which resulted in a verdict and judgment for \$5,000.00 in favor of appellee and the record is brought to this court for review by appeal.

It is contended by appellant that the evidence discloses that it was not guilty of the negligence charged; that appellee was guilty of contributory negligence; that the trial court erred in its instructions and also in denying appellant's request to require appellee to submit to a physical examination.

The evidence discloses that Bolivar Avenue runs in an easterly and westerly direction in the village of Bartonsville and that on the north side thereof there is a ditch or gully, which also extends in an easterly and westerly direction. Collater Avenue is north of south and runs parallel with Bolivar Avenue. West Avenue is north of Bolivar Avenue and runs north and south, but its westerly end does not intersect with Bolivar Avenue. There is, however, a foot bridge across this gully or ditch which connects with a path which leads to the north end of West Avenue. Appellee is a boy, and at the time of the accident was sixteen years of age and lived at home with his parents on Collater Avenue. Between seven and seven-thirty o'clock on the evening of July 17, 1932 he left his home in company with Louis Lottel, a neighbor boy twelve years old, and John Gornel, a brother of Louis, who was about fifteen years of age, and started toward the

and started to pick black berries. Louis and appellee continued north and entered Bolivia Avenue and thence west to the bridge. Louis reached the bridge first and had proceeded almost to the northerly end of it when appellee reached it. According to appellee's testimony, he had just walked onto the bridge and turned around to see if Farm was coming, and in so doing his hip hit the banister or railing on the westerly side of the bridge and it gave way, causing appellee to fall into the ditch, striking his back upon a rock therein, seriously injuring the socket of his left shoulder. Louis Correl also fell, but was uninjured.

The evidence further discloses that this bridge was ten or twelve feet in length, the floor of the bridge being not to exceed five feet from the bottom on the gully. Prior to July 7, 1930 the only means of crossing this gully was by two planks, there being no banisters or hand rails. On July 7, 1930 the foot bridge which spanned this gully was built. Two eight by eight inch sills or stringers between twelve and fourteen feet in length, of fir lumber, were used and across these a floor was laid of 1 x 8's three feet long. On the westerly side of the bridge, two boards, each two inches by four inches, were used as uprights to support the banister. One was near the north end and the other near the south end of the bridge and were about eight feet apart. Each rested on some rock in the bottom of the ditch and with its four inch side to the sill, extended above the floor of the bridge two and one-half or three feet. Each upright was nailed to the sill and to another two by four inch board about twelve feet long, which constituted the banister or hand rail as it is spoken of in this record. This banister extended about two feet south of the southerly upright and approximately two feet north of the northerly upright. The banister was nailed with its

and started to pick black berries. Louis and Agapies continued
up and entered Bolivia Avenue and then went to the bridge. Louis
crossed the bridge first and had proceeded almost to the westerly
end of it when Agapies reached it. According to Agapies' testimony,
he had just walked onto the bridge and turned around to see if Louis
was coming, and in so doing his hip hit the banister on the landing on
the westerly side of the bridge and it gave way, causing Agapies to
fall into the ditch, striking his back upon a rock beneath, seriously
injuring the socket of his left shoulder. Louis Carter also fell,
but was unhurt.

The evidence further discloses that this bridge was ten or
twelve feet in length, the floor of the bridge being not so much
the feet from the bottom of the gully. Prior to July 7, 1930 the
only means of crossing the gully was by two planks, there being no
stairs or hand rails. On July 7, 1930 the foot bridge which
crossed this gully was built. The height by eight inch sills or
stringers between twelve and fourteen feet in length, of the lumber,
was laid and across these a floor was laid of 1 x 8's three feet
long. On the westerly side of the bridge, two boards, each two
feet by four inches, were used as uprights to support the banister.
One was near the north end and the other near the south end of the
bridge and were about eight feet apart. Each rested on one rock in
the bottom of the ditch and with its four inch side to the sill, or
laid above the floor of the bridge two and one-half or three feet
from the sill it was nailed to the sill and to another two by four inch
board about twelve feet long, which constituted the banister on hand
rail as it is spoken of in this record. This banister extended about
seven or eight feet south of the upright and approximately two feet
north of the northerly upright. The banister was nailed with its

four inch side to the uprights. These uprights and banister were of pine, bought new in 1929 and the street commissioner testified that they may have been used by appellant for a street "blockage" or barricade before they were used in the bridge in July 1930.

At the time of the accident, appellee and Louis Correl were the only ones on the bridge. It is the theory of appellant that these boys must have been scuffling or pushing or exerting some force or power against this bannister or it would not have given away and in this connection our attention is called to the evidence of Mrs. Cora Brown, who lived across the street from this foot bridge. She testified that she had had occasion to cross the bridge frequently and did pass over it between five and six o'clock on the same evening when the accident occurred and at that time the banister was up and as she passed over it, she did not then or at any time prior thereto observe any portion of it being rotten or decayed. When the southerly upright was exhibited to her on cross examination, she stated that, as she passed along the bridge that afternoon, she had not noticed "that rottenness" as she expressed it, indicating a portion thereof. She further testified that she had never touched her hand to the banister, but that it appeared all right to her.

Appellant also insists that the physical conditions after the accident support its theory as the north upright was disconnected from the sill, but the banister remained nailed to this upright and both were in the ditch while the south upright remained attached to the sill of the bridge, but the banister had pulled away therefrom. Appellant further insists that the evidence discloses that the banister was nailed to the inside, that is, the bridge side of both uprights,

town, each side to the water. When night falls and darkness comes, they may have been used by vigilantes for a short while before they were used in the riot in July 1930.

At the time of the accident, according to the witness, it was the only one of the bridge. It is the theory of vigilantes that these days there have been something on the side of the river, some force or power against the vigilantes or it could not have been away and in this connection our attention is called to the witness of Mr. ... who lived across the river from the bridge. The witness said the had had occasion to cross the bridge frequently and did pass over it between five and six o'clock on the same evening when the accident occurred. At that time the witness was up and as the bridge over it, the did not then or at any time. The witness further says that he did not see or hear anything. When the accident occurred, the witness was not on the bridge. The witness said, as he passed the bridge that afternoon, he had not noticed "that something" as he expressed it, indicating a portion thereof. The witness testified that she had never touched her hand to the witness, but that it occurred all right to her.

Appellant also insists that the physical conditions after the accident support the theory as the north bridge was disconnected from the city, and the witness testified that he went to the bridge and was in the river with the bridge. The witness testified that he was all of the bridge, but the witness had walked away therefrom. Appellant further insists that the evidence discloses that the witness was nailed to the bridge, that is, the bridge side of both bridges.

and that both uprights were nailed to the sill by five spikes. One of which was a thirty penny, two were twenty pennies and two were sixteen pennies, and that therefore a sufficient amount of force was exerted by these boys to loosen the spikes which fastened the north upright and when it gave way both were precipitated simultaneously into the gully below.

It is the theory of appellee that the banister was nailed to the inside of the north upright and to the outside of the south one. The uprights, banister and nails taken therefrom were produced at the trial and the jury examined them. They have also been certified to this court for our inspection and we have considered them in the light of all the testimony in this record and from a consideration of all the evidence, we are unable to say that the jury was not warranted in adopting the theory of appellee, nor is the finding of the jury that appellant is guilty of the negligence charged and appellee free from such contributory negligence as would bar a recovery manifestly against the weight of the evidence.

It is unnecessary to review at length all the evidence in this record as to the condition of the uprights, and banister of this bridge at the time of the accident. It is sufficient to state that Harold Lakota testified that he had crossed this bridge frequently for several years preceding the accident. That in May, prior to the accident, the banister was loose and could easily be shaken and that the nails which fastened the uprights to the banister were rusty and that the uprights and stringers were rotten and the corners where the uprights were nailed to the banister were decayed. Louis Correl testified that he examined the banister the night after the accident and found the nails rusty and the upper end of the up-

and that both uprights were nailed to the wall by five spikes.
one of which was a thirty penny, two were twenty pennies and two
were sixteen pennies, and that therefore a sufficient amount of
force was exerted by these boys to loosen the spikes which fastened
the north upright and when it fell away both were precipitated
simultaneously into the water below.

It is the theory of appellee that the banister was nailed
to the inside of the north upright and to the outside of the south
one. The uprights, banister and nails taken therefrom were pro-
duced at the trial and the jury examined them. They have also been
certified to this court for our inspection and we have considered
them in the light of all the testimony in this record and from a
consideration of all the evidence, we are unable to say that the
jury was not warranted in finding the theory of appellee, and in
the finding of the jury that appellant is guilty of the negligence
charged and appellee free from such contributory negligence as
would bar a recovery manifestly against the rest of the evidence.
It is unnecessary to review at length all the evidence in
this record as to the condition of the building, the condition of
this bridge at the time of the accident. It is sufficient to state
that Harold Lakota testified that he had crossed this bridge fre-
quently for several years preceding the accident. That in May,
prior to the accident, the banister was loose and could easily be
shaken and that the nails which fastened the uprights to the banister
were rusty and that the uprights and strings were rotten and the
corners where the uprights were nailed to the banister were decayed.
Louis Corneil testified that he examined the banister the night after
the accident and found the nails rusty and the upper end of the up-

right "rotten enough so that a part of the top came off with the end of the railing". Charles Watkins stated that he frequently crossed this bridge and at various times he put his hand on the rail and notice that it was rotten where it was nailed to the top of the uprights. Orie Jibben, Roy Hayes and George Jibben likewise testified as to the uprights and banister which they described as rotten or decayed and also as to the rusty nails taken therefrom. One of these witnesses, Hayes, described the top of the south upright and the south end of the banister as being "plenty rotten". To overcome this testimony appellant introduced a number of witnesses whose evidence tended to prove that the lumber used at the time the bridge was built was in good condition and the bridge properly constructed. That it appeared to be a substantial bridge and Jesse Higgins, appellant's street commissioner, examined it in April, 1932 and no portion of the banister or uprights appeared to the naked eye to be decayed or rotten at that time. Other witnesses testified that as they crossed the bridge it did not wobble or weave, the banister appeared to be in good condition and they did not observe that either the banister or uprights were not substantial. With the record in this condition, it was peculiarly the province of the jury to determine the facts and in the absence of erroneous rulings of the trial court, either in the admission or rejection of evidence or upon instructions as to the law, this court would not be warranted in interfering with the findings of the jury.

In this connection counsel for appellant insists that reversible error was committed by the trial court in refusing ^{to embody} the following in its instructions: "That the plaintiff cannot recover in this case unless the jury find by a preponderance of the evidence that the defendant had notice, either actual or constructive

might "rotten enough so that a part of the top came off with the
of the railing". Charles Watkins stated that it frequently
crossed this bridge and at various times he put his hand on the rail
and notice that it was rotten where it was nailed to the top of the
upright. Orie Tibben, Roy Hayes and George Tibben likewise testi-
fied as to the condition of the railing which they described as rotten
and decayed and also as to the rusty nails taken therefrom. One of
the witnesses, Hayes, described the top of the south upright and
the south end of the banister as being "plenty rotten". He over-
came this testimony appellant introduced a number of witnesses
whose evidence tended to prove that the lumber used at the time the
bridge was built was in good condition and the bridge properly con-
structed. That it appeared to be a substantial bridge and was
strong, appellant's expert commissioner, examined it in April, 1932
and no portion of the banister or uprights appeared to be rotted
or decayed or rotten at that time. Other witnesses testified
that as they crossed the bridge it did not wobble or weave, the
banister appeared to be in good condition and they did not observe
that either the banister or uprights were not substantial. With
the record in this condition, it was peculiarly the province of the
jury to determine the facts and in the absence of erroneous rulings
of the trial court, either in the admission or rejection of evidence
or upon instructions as to the law, this court would not be warranted
in interfering with the findings of the jury.
In this connection counsel for appellant insists that re-
versible error was committed by the trial court in refusing the
following in its instructions: "That the plaintiff cannot recover
in this case unless the jury find by a preponderance of the
evidence that the defendant had notice, either actual or constructive

of the defective condition of the bridge". There was no error in refusing to add this to the charge which the court gave to the jury. It does not define or explain to the jury what is meant by constructive notice. It is true that appellant was not liable unless it had either actual or constructive notice of the defective condition of this bannister and uprights, and if the suggestion had gone further and defined constructive notice, there might be some merit in appellant's contention. Furthermore, we have read the court's instructions and in our opinion the jury was fully and properly instructed.

It is finally insisted that it was error for the court to deny appellant's motion to require appellee to submit to a physical examination by appellant's physicians. The record discloses that appellee had testified and while on the stand exhibited his back and chest to the jury. Following his testimony several other witnesses testified and the court recessed until the following morning. When court again convened on the following morning, appellant made its motion out of the presence of the jury and requested the court to fix the time, place and conditions under which the examination should be made. Counsel for appellee thereupon stated that the court should designate the physician before appellee finished his case. Counsel for appellant refused. Counsel for appellee then stated: "I want the examination made before I close my case and report made to the court that I may see". Counsel for appellee ^{said} ~~then~~ made no reply to this suggestion and after an inquiry by the court and a further statement by counsel for appellant, the court denied the motion. In support of appellant's contention, the cases of Swenson v. City of Aurora, 196 Ill. App. 83 and Pronskévitch v. C. and A. Ry. Co., 232 Ill. 136 are cited. We have examined those cases

and while the court might have granted appellant's request and required appellee to submit to an examination of that portion of his body which was exhibited to the jury, certainly appellee had a right to have his own physician present and it would not have been unreasonable to have had the examination completed before appellee's case was closed. In the instant case it is not insisted that the damages are excessive and the only purpose of desiring an examination by a physician other than of appellee's choosing would be to determine the extent of appellee's injuries and as that question is not raised in appellant's argument, the error if any was committed was a harmless one.

There is no reversible error in this record and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

and while the court might have granted appellant's motion and re-
versed appellee to submit to an examination of that portion of his
body which was a hindrance to the jury, certainly appellee had a right
to have his own physical condition and its state had been uncer-
tainable to have had the examination comply with appellant's case
was closed. In the instant case it is now held that the damages
are excessive and the only means of determining an examination by a
physician other than an appellee's choosing would be to determine
the extent of appellee's injuries and as that question is not raised
in appellant's argument, the error if any was corrected was a harm-
less one.

There is no reversible error in this record and the judgment
is therefore affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

457
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 6471

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 14 1935 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Henry Boomgarden, as Administrator
of the Estate of Augusta Boomgarden,
deceased,

Appellant,

vs.

Appeal from the Circuit

Court of Iroquois County

Chicago and Eastern Illinois Railway
Company, a Corporation,

Appellee.

DOVE - J.

This action was brought to recover damages for the alleged wrongful death of Augusta Boomgarden, growing out of a railroad crossing accident occurring at the intersection of Hickory Street and the right of way of the defendant below, in Watseka on July 9, 1930. The original declaration was filed on October 23, 1930. It consisted of four counts, each charging the defendant with negligence only. On October 17, 1931 each of the four counts were amended and as amended eliminated all charges of negligence and sought to charge the defendant with wilful and wanton conduct. The defendant plead the general issue and a trial was had, resulting in a verdict and judgment in favor of the plaintiff for \$3,000.00. An appeal was taken to this court, and that judgment was reversed and the cause was remanded. Boomgarden, Administrator, etc. v. C. & E. I. Ry. Co., 266 Ill. App. 622. That opinion is not published, but what we there held was that each count of the declaration as amended did not state a cause of action of wilful and wanton injury and further held that the evidence wholly failed to show that the defendant was guilty of any wilful or wanton conduct which in any manner caused the death of the plaintiff's intestate.

In the Appellate Court of Illinois

County of Cook

October Term, A. D. 1934

Henry Boonsgaarden, as Administrator,
of the Estate of August Boonsgaarden,
Deceased,

Appel from the Circuit
Court of Cook County

Chicago and Eastern Illinois Railway
Company, a Corporation,

vs. - 1.

This action was brought to recover damages for the alleged

wrongful death of August Boonsgaarden, growing out of a collision

crossing accident occurring at the intersection of Michigan Street

and the right of way of the defendant below, in Chicago on July 9,

1930. The original declaration was filed on October 22, 1930. It

consisted of four counts, each charging the defendant with negligence

only. On October 19, 1931 each of the four counts were amended and

as amended eliminated all charges of negligence and sought to charge

the defendant with willful and wanton conduct. The defendant pleaded

the general issue and a trial was had, resulting in a verdict and

judgment in favor of the plaintiff for \$2,000.00. An appeal was taken

to this court, and that judgment was reversed and the cause was re-

manded. Boonsgaarden, Administrator, etc. v. C. & E. Ry. Co.,

206 Ill. App. 622. That opinion is not published, but what we there

held was that each count of the declaration as amended did not state

a cause of action of willful and wanton injury and further held that

the evidence which tends to show that the defendant was guilty of

negligence or wanton conduct which is not sufficient to sustain the claim of

the plaintiff's negligence.

Upon the case being reinstated in the trial court, the plaintiff, on July 25, 1933, filed, by leave of court, what he designated as first amended count as amended. This count charged that on July 9, 1930 the defendant was operating a passenger train over its railroad, driving the same through a thickly settled portion of Watseka in a northerly direction across Hickory Street and other streets within the corporate limits of said city; that it was the custom of the public generally to pass over the Hickory Street crossing on foot, horseback and by various vehicles of conveyance; that this custom and practice was well known to the servants in charge of the said train; that about 6:15 P. M. on July 9, 1930, Augusta Boomgarden was walking along Hickory Street in a northwesterly direction across the railroad and over said crossing; that she was unaware of the approaching train and in a position where the servants of defendant saw her or by the exercise of ordinary care could have seen her and saw or could have seen that she was unaware of the approaching train or the danger which threatened her; that said servants were conscious from their knowledge of surrounding circumstances that their failure to proceed with caution and their driving of said locomotive at a speed in excess of fifteen miles per hour would naturally result in injury to persons on said crossing, including plaintiff's intestate; that it became the duty of the engineer and fireman, in control of said train, who were servants of defendant, to keep a lookout for persons who might be lawfully upon said crossing and to sound a warning of the approach of said train and to warn Augusta Boomgarden of the danger threatening her and to approach said crossing with caution and to so manage said train so as not to inflict injury upon her, then and there known by said servants to be lawfully upon said crossing. This count then charges a breach of this duty by alleging that the servants of the defendant who were in control of said locomotive, with reckless disregard of the life of the said Augusta Boomgarden, wilfully and wantonly failed to keep a lookout down the track for the protection of persons lawfully using

the Hickory Street crossing and wilfully and wantonly failed to approach the crossing with caution and although they saw the said Augusta Boomgarden in a situation of peril, they wilfully and wantonly disregarded their duty and with reckless disregard of the life of said Augusta Boomgarden, the servants of defendant refused to give her warning and wilfully and wantonly drove said locomotive at a speed in excess of fifteen miles per hour and without warning wilfully and wantonly drove the locomotive upon her and wilfully and wantonly inflicted great bodily injuries upon her, as a consequence of which she died three hours thereafter.

To the amended counts filed October 17, 1931 and to the foregoing first amended count as amended, filed July 25, 1933, the defendant filed its general and special demurrer, which was by the court sustained and the plaintiff electing to abide by these several counts, refused to plead further and from a judgment in bar of the action and for costs the plaintiff brings the record to this court for review by appeal.

Appellee concedes that the count filed July 25, 1933 stated a good cause of action but insists that inasmuch as no cause of action had been stated in any of the previous counts filed by appellant, that the court therefore properly sustained a demurrer thereto. Appellant insists that by operation of law this count relates back to the original cause of action stated in the first declaration, which was filed on October 23, 1930; that this count does not state a new cause of action, but was simply a restatement of the specified conduct upon which the original declaration was based; that the statute of limitations can not be raised by demurrer in an action at law but only by a plea, and therefore the judgment of the trial court should be reversed.

The Injuries Act, upon which this proceeding was instituted, provides that the action must be brought within one year after the decease of the party for whose wrongful death the action was instituted.

she died three hours thereafter.

view by appeal.

The court concludes that the court filed July 20, 1930, stated a good cause of action but is late that it cannot be the cause of action and been stated in any of the previous counts filed by appellants, that the court's decision is based on the original cause of action stated in the first caption, which was filed on October 22, 1930; that this court does not state a new cause of action, but was simply a restatement of the specified conduct upon which the original decision was based; that the statute of limitations can not be raised by defendant in an action as late as July 20, 1930, and therefore the judgment of the court should be reversed.

anytime that the nation would be brought to this one year after the
The Defense Act, your job is to be successful in the future.

Cahill Illinois Revised Statutes, Chap. 70, Sec. 2. The time fixed for bringing such actions is a condition of liability, *Hartray v. Chicago Railways Co.*, 290 Ill. 85, *Goldstein V. Chicago City Ry. Co.*, 286 Ill. 297, and appellee's demurrer properly raised the question whether the action was brought within the statutory period. *Holden v. Schley*, 271, Ill. App. 159. *Bishop v. Chicago Rys. Co.*, 303 Ill. 273.

The original declaration in the instant case was filed October 23, 1930. It consisted of four counts in each count of which negligence only was charged. This declaration was abandoned by the filing of an amended declaration on October 17, 1931. *McAleeman v. East St. Louis Light and Power Co.*, 188 Ill. App. 291, *Holt v. City of Moline*, 196 Ill. App. 235. In this amended declaration plaintiff sought to charge wilful and wanton conduct and this court has held that no cause of action was stated in any of these amended counts. *Bommgarden, Admr. v. C. & E. I. Ry. Co.*, supra. The averments of negligence and the averments of wilful and wanton conduct are entirely different, *O'Neill v. Blair*, 261 Ill. App. 470, and when a declaration charges negligence and wilful and wanton conduct a general verdict will not be permitted to stand, as it is impossible to say upon which charge the jury based its verdict, *Broadbent v. Kagly*, 275 Ill. App. 623. Proof of negligence will not support the averments of a declaration alleging wilful and wanton conduct and proof of wilful and wanton conduct will not support a declaration alleging negligence. The death of plaintiff's intestate may have been caused by the negligence of the servants of appellee, or it may have been caused by their wilful and wanton conduct, but it was not caused by both. *Grinestaff v. New York Central Railroad*, 253 Ill. App. 162-589.

In *Bahn v. National Safe Deposit Co.*, 234 Ill. 101, it is said: "The rule is established in this state that the Statute of Limitations expiring after the commencement of an action bars recovery

and Illinois Revised Statutes, Chap. 70, sec. 2. The time

fixed for bringing such action is a condition of liability,

Hartway v. Chicago Railway Co., 280 Ill. 68, 120 N.W. 2d 1000.

City Ry. Co., 280 Ill. 687, and appellee's demurrer properly raises

the question whether the action was brought within the statutory

period. Kolder v. Kelly, 271 Ill. App. 129, 1937, 10 N.W. 2d 1000.

Ill. 28, 1937, 10 N.W. 2d 1000.

The original declaration in the instant case was filed October

23, 1930. It consisted of four counts in each count of which negli-

gence only was charged. This declaration was abandoned by the fil-

ing of an amended declaration on October 17, 1931. Weinmann v.

East St. Louis Light and Power Co., 188 Ill. App. 231, 10 N.W. 2d 1000.

City of Moline, 188 Ill. App. 233. In this amended declaration

plaintiff sought to charge willful and wanton conduct and this

court has held that no cause of action was stated in any of these

amended counts. Weinmann v. East St. Louis Light and Power Co., 188 Ill. App. 231, 10 N.W. 2d 1000.

The averments of negligence and the averments of willful and wanton

conduct are entirely different. O'Neil v. Blair, 281 Ill. App. 470,

and when a declaration charges negligence and willful and wanton

conduct a general verdict will not be permitted to stand, as it is

impossible to say upon which charge the jury based its verdict.

Broadbent v. Kelly, 275 Ill. App. 623. Proof of negligence will

not support the averments of a declaration alleging willful and

wanton conduct and proof of willful and wanton conduct will not

support a declaration alleging negligence. The death of plaintiff's

instanter may have been caused by the negligence of the defendant

of appellee, or it may have been caused by their willful and wanton

conduct, but it was not caused by both. O'Neil v. Blair, 281 Ill. App. 470.

Central Railway, 281 Ill. App. 470-471.

Ill. 28, 1937, 10 N.W. 2d 1000.

upon an amended pleading afterwards put in, where the original pleading fails to state a cause of action; or, stated in other words, the rule is, that when a plaintiff, in his original declaration filed before the Statute of Limitations has run against his cause of action, fails to aver any cause of action whatever, and afterwards, when the statute has run, filed an amended declaration with new and additional counts which do set up a cause of action, such new counts must be held to state a new cause of action, - - one never before stated, and one that is barred by the statute."

In *Allis-Chalmers Mfg. Co. v. Chicago*, 297 Ill. 444, the court stated that the rule was well established that when a cause of action is stated for the first time in an amended count of a declaration, the suit is regarded as having been commenced as to such cause of action at the time of filing the amended count, and if the Statute of Limitations has then run, it will be a bar to the new cause of action stated in the amended count.

Under these authorities this court is obliged to hold that appellant for the first time stated a cause of action in his declaration filed July 25, 1933, and we must therefore regard this suit as having been commenced at that time. Appellant insists that it was just this construction which the 1929 amendment sought to remedy and calls our attention to the case of *Zister v. Pollack*, 262 Ill. App. 170, which was an action brought under the Injuries Act to recover damages sustained by the heirs at law of Anthony M. Zister, deceased, whose death, it was alleged, was caused by the negligence of the defendants. Anthony M. Zister died February 24, 1929. The allegations of the original declaration were that the deceased "on to-wit: February 16, 1929" through the negligence of the defendants in operating two automobiles on streets in Chicago, was struck by the automobiles with great force and violence "and thereby the said Anthony M. Zister was then and there thrown with great force and violence to and upon the ground there, and was thereby then and there killed" and that he left

upon an amended pleading otherwise but in, where the original pleading
fails to state a cause of action; or, stated in other words, the rule
is, that when a pleading, in its original decision filed before
the state of limitation has been entered his cause of action, fails
to aver any cause of action whatever, and afterwards, when the statute
has run, filed an amended pleading with new and additional counts
which do not set up a cause of action, then new counts must be held to
state a new cause of action, - one never before stated, and one that
is barred by the statute."

It is also stated that the rule was well established that when a cause of action
is stated for the first time in an amended count of a pleading,
the suit is regarded as having been commenced as to such cause of
action at the time of filing the amended count, and if the statute
of limitations has then run, it will be a bar to the new cause of
action stated in the amended count.

Appellant for the first time stated a cause of action in his decision-
tion filed July 25, 1903, and we must therefore regard this suit as
having been commenced at that time. Appellant insists that it was
just this construction which the 1892 amendment sought to remedy and
calls our attention to the case of *Estes v. Hollen*, 202 Ill. App.
170, which was an action brought under the injuries act to recover
damages sustained by the heirs at law of Anthony M. Estes, deceased,
whose death, it was alleged, was caused by the negligence of the
defendants. Anthony M. Estes died January 24, 1892. The allegations
of the original pleading were that the deceased was killed by the
negligence of the defendants on or about the 1st day of January, 1892,
and that the same day the said Anthony M. Estes was
then and there thrown with great force and violence to and upon the
ground there, and was thereby then and there killed, and that he left

him surviving certain heirs. At the conclusion of the third count it was alleged "To the damage of the plaintiff, as administratrix, as aforesaid, of \$10,000.00 and therefore she brings her suit within one year from the date of the death of plaintiff's intestate." On June 25, 1930, an amended declaration was filed, the allegations being substantially the same as in the original declaration, except in the amended declaration it was alleged that the plaintiff died February 24, 1929, as a result of the injuries which he sustained February 16, 1929. Among other pleas, the defendant plead that the cause of action set up in the amended declaration did not accrue within one year after the death of Anthony M. Zister. The trial court held that the Statute of Limitation barred the cause of action asserted in the amended declaration. The Appellate Court held that the amendment to the declaration setting up the specific date of the death of the deceased, although filed more than a year after the date of such death, related back to the date of the filing of the original pleading and said: "It is obvious that the cause of action asserted in the amended declaration grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading. The cause of action asserted in both the original and amended declaration was to recover damages on account of the claimed negligence of the defendants in striking Anthony M. Zister on February 16, 1929 as a result of which he died. The time and place of the accident are particularly pointed out in both pleadings. The only allegation claimed to have been omitted in the original declaration was the date of the death of the deceased. It is clear that the cause of action asserted in both pleadings is one and the same and not different causes of action. * * * Prior to the enactment of the amendment to Section 39, there were many pitfalls that were fatal to a plaintiff should his counsel fail to allege in his declaration all essential facts and should the time limited within which an action must be brought have expired before the omission had been discovered. And such omissions in most cases

him surviving certain heirs. At the conclusion of the third count it was alleged "To the damage of the plaintiff, as administrator, as aforesaid, of \$10,000.00 and therefore the prayer for relief within one year from the date of the death of plaintiff's intestate." On June 25, 1930, an amended declaration was filed. The allegations before substantially the same as in the original declaration, except in the amended declaration it was alleged that the plaintiff died February 24, 1929, as a result of the injuries which he sustained February 18, 1929. Among other things, the defendant pleads that the cause of action set up in the amended declaration did not accrue within one year after the death of Anthony M. Elster. The trial court said that the statute of limitation barred the cause of action because it was barred by the statute. The appellate court held that the amendment to the declaration setting up the specific date of the death of the deceased, although filed more than a year after the date of such death, related back to the date of the filing of the original pleading and said: "It is obvious that the cause of action asserted in the amended declaration grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading. The cause of action asserted in both the original and amended declaration was to recover damages on account of the alleged negligence of the defendants in striking Anthony M. Elster on February 18, 1929 as a result of which he died. The time and place of the accident are positively pointed out in both pleadings. The only allegation claimed to have been omitted in the original declaration was the date of the death of the deceased. It is clear that the cause of action asserted in both pleadings is one and the same and not different causes of action. * * * Prior to the amendment of the amendment to Section 39, there were many decisions that were fatal to a plaintiff should his counsel fail to allege in his declaration all essential facts and events and some limited within which an action must be brought before it is barred by the statute and such decisions have been distinguished. And with reference to such cases

do not prejudicially affect the defendant in the filing of his plea or the making of his defense. It was to obviate and remove these pitfalls that the Legislature enacted the amendment. With this construction effect will be given to the amendment."

In our opinion the Zister case is clearly distinguishable from the instant case as in that case there was a defective statement of a good cause of action and the amendment did not assert a new cause of action. Not so here. The original declaration had been abandoned and no cause of action was stated, we held in our former opinion in any of the four counts filed October 17, 1931. For the first time a cause of action was stated in the count filed July 25, 1933, and this was long after the lapse of the period provided for the institution of suits of this character.

Keslick v. William Heating Corporation, 277 Ill. App. 263 was a suit instituted by Lucille Keslick, as administratrix of the estate of her deceased husband, to recover damages for the death of her husband, in which she charged a violation of the Occupational Diseases Act. The declaration alleged that Floyd H. Keslick died on December 6, 1931. Additional counts were thereafter filed to which a demurrer was sustained on the ground that the action was improperly brought by the administratrix. On September 26, 1933, Lucille Keslick individually and William Keslick, a minor son of Floyd H. Keslick, deceased, by Lucille Keslick, his next friend, were substituted as parties plaintiff in lieu of Lucille Keslick as administratrix. On October 18, 1933 the plaintiff dismissed William Keslick as a party plaintiff and left Lucille Keslick as sole plaintiff. To this declaration as amended a special plea was filed to the effect that the causes of action in the amended declaration were separate and distinct from those alleged in the original declaration and that they did not accrue to the plaintiff at any time within one year before the filing of the amended declaration. In holding that the trial court properly overruled a demurrer to this plea, the

do not prejudicially affect the defendant in the filing of his plea on the making of his defense. It was to observe and remove these difficulties that the legislature enacted the amendment. With this construction effect will be given to the amendment.

In our opinion the instant case is clearly distinguishable from the instant case as in that case there was a defective statement of a good cause of action and the amendment did not assert a new cause of action. Not so here. The original declaration had been abandoned and its cause of action was stated, we held in our former opinion in any of the four counts filed October 17, 1931. Now the first time a cause of action was stated in the count filed July 28, 1932, and this was long after the lapse of the period provided for the institution of suits of this character.

Lucille M. Keelick v. William Keelick, 171 Ill. App. 2d 424.

was a suit instituted by Lucille Keelick, as administratrix of the estate of her deceased husband, to recover damages for the death of her husband, in which she alleged a violation of the Occupational Diseases Act. The declaration alleged that Floyd M. Keelick died on January 2, 1927. The instant case was brought on the ground that the action was improperly brought by the administratrix. On September 20, 1932, Lucille Keelick individually and William Keelick, a minor son of Floyd M. Keelick, deceased, by Lucille Keelick, his next friend, were substituted as parties plaintiff in lieu of Lucille Keelick as administratrix. On October 18, 1932 the plaintiff dismissed as a party plaintiff and left Lucille Keelick as sole plaintiff. To this declaration as amended a special plea was filed to the effect that the cause of action in the amended declaration was separate and distinct from those alleged in the original declaration and that they did not accrue to the plaintiff at any time within one year before the filing of the amended declaration. In holding that the suit was properly sustained a majority in this plea, the

Appellate Court for the Third District held that the original declaration stated no cause of action and that no cause of action was ever stated under the Occupational Diseases Act until the amendment to the original declaration was filed, which was two years after the death of Floyd H. Keslick. In disposing of the contention that under the amendment of 1929 to Section 59 of the old Practice Act the amendment to the declaration related back to the filing of the suit, the court said: "In the present case the original declaration stated no cause of action because the statute did not authorize suit to be brought by the administratrix. We therefore do not think that the cause of action asserted in the amended declaration can be held as being substantially the same as that stated in the original declaration. The appellate courts of this state have recently so construed that amendment to the Practice Act. *Hanley v. Waters*, 255 Ill. App. 239; *Holden v. Schley*, 271 Ill. App. 159; *Redman v. Schilthelm*, 273 Ill. App. 222".

Hanley v. Waters, supra, was an action brought to recover damages for negligently causing the death of a boy. The original declaration contained no allegations that the deceased left him surviving any next of kin who sustained pecuniary loss as a result of his death. A demurrer was sustained to the declaration and an amended declaration was filed more than two years after the death of plaintiff's intestate and in each count of the amended declaration it was alleged that the deceased, at the time of his death, left certain parties as his next of kin. The defendant plead that the causes of action had not accrued within one year next before the commencement of the suit, and to this plea a demurrer was sustained. In its opinion, the Appellate Court stated that the action was commenced within one year after the death of plaintiff's intestate, but the declaration had not stated a good cause of action in that it did not allege that the deceased left him surviving any next of kin who had suffered pecuniary loss because of his death, and for that

Appellate Court for the Third District held that the original decision stated no cause of action and that no cause of action was ever stated under the constitutional provision until the amendment to the original decision was filed, which was two years after the death of Floyd W. Kasilak. In disposing of the question that under the amendment of 1912 to Section 29 of the old practice act the amendment to the decision related back to the filing of the suit, the court said: "In the present case the original decision stated no cause of action because the statute did not authorize suit to be brought by the administrator. He therefore do not think that the cause of action asserted in the amended decision can be held as being substantially the same as that stated in the original decision. The appellate courts of this state have recently so construed that amendment to the statute act, which was passed in 1912, that it did not relate back to the original decision." 273 Ill. App. 122.

Hanley v. Waters, supra, was an action brought to recover damages for negligently causing the death of a boy. The original decision contained no allegations that the deceased left him surviving any next of kin who sustained pecuniary loss as a result of his death. A demurrer was sustained to the decision and an amended decision was filed more than two years after the death of plaintiff's intestate and in each count of the amended decision it was alleged that the deceased, at the time of his death, left certain parties as his next of kin. The defendant pled that the cause of action had not accrued within one year next before the commencement of the suit, and so this was a bar to the action.

In its opinion, the Appellate Court stated that the action was commenced within one year after the death of plaintiff's intestate, but the decision had not stated a good cause of action in that it did not allege that the deceased left him surviving any next of kin who had suffered pecuniary loss because of his death, and for that

reason held that the trial court properly sustained defendant's demurrer to the declaration. It was not until more than two years after the death that plaintiff filed an amended declaration in which it was alleged that the deceased had left him surviving next of kin who had suffered pecuniary loss as a result of his death and which for the first time stated a good cause of action against defendants. The opinion then quoted from the case of *Devaney v. Otis Elevator Co.*, 251 Ill. 28, where it is said: "The rule is familiar that when a cause of action is stated for the first time in an amended or additional count, the suit is regarded, as to such cause of action, as having been commenced at the time when such amended or additional count is filed, and if the period fixed by the statute of limitations has run when such a count is filed, the plea setting up the statute is a proper plea and a good defense for such newly stated cause of action." In commenting upon the amendment of 1929 to Section 39 of the Practice Act, the court in the *Hanley* case said: "It will be noticed that the amendment is to be applicable 'if it shall appear from the original and amended pleading that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading'. But in the original declaration in the present case, no cause of action was asserted because essential facts * * * were not alleged. And hence we do not think that the cause of action asserted in the amended declaration can be considered as being substantially the same as that stated in the original declaration."

Holden v. Schley, supra, was also an action brought under the Injuries Act and it appeared that plaintiff's intestate died on September 3, 1928. The suit was commenced on August 6, 1929 and the original declaration was filed September 24, 1929, each count of which omitted any allegation as to due care and caution on the part of the next of kin and beneficiaries of the deceased, and also failed to disclose by any facts or circumstances the conduct of the next of kin. On August 2, 1930 an amended declaration was filed, which

reason held that the trial court properly sustained defendant's demurrer to the declaration. It was not until more than two years after the death that plaintiff filed a amended declaration in which it was alleged that the deceased had left him surviving next of kin who had suffered pecuniary loss as a result of his death and which for the first time stated a good cause of action against defendant. The opinion then quoted from the case of *Lawrence v. Otto*, 132 Cal. 281, 111 P. 2d 100, where it is said: "The rule is familiar that when a cause of action is stated for the first time in an amended or additional count, the rule is applied, as to such count or action, as having been commenced at the time when such amended or additional count is filed, and if the parties filed by the statute of limitations has run when such a count is filed, the time setting up the statute is a proper time and a good defense for such newly stated cause of action." In commenting upon the amendment of 1930 to Section 26 of the Practice Act, the court in the *Harley* case said: "It will be noticed that the amendment is so applicable that it shall appear from the original and amended pleading that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading." But in the original declaration in the present case, no cause of action was asserted because essential facts * * * were not alleged. And hence we do not think that the cause of action asserted in the amended declaration can be considered as being substantially the same as that stated in the original declaration.

Harley v. Harley, supra, was also an action brought under the Injuries Act and it appeared that plaintiff's interest died on September 2, 1920. The suit was commenced on August 6, 1929 and the original declaration was filed November 24, 1929, and count 2 which omitted any allegation as to due care and caution on the part of the next of kin and beneficiaries of the deceased, and also failed to recite by any facts or circumstances the conduct of the next of kin. On August 2, 1930 an amended declaration was filed, which

contained the necessary allegation. A demurrer was interposed to the amended declaration and sustained, and the Appellate Court for the Third District, in affirming the action of the trial court, said: "The rule is well established that when a cause of action is sustained for the first time in an amended count of a declaration, the suit is regarded as having been commenced as to such cause of action at the time of filing the amended count, and if the statute of limitations has then run, it will be a bar to the new cause of action stated in the amended count".

In our opinion the count filed July 25, 1935, stated for the first time a cause of action and as more than the statutory period had then elapsed, since the death of appellant's intestate, and as these facts appeared upon the face of the pleadings, the trial court did not err in sustaining the demurrer and the judgment will therefore be affirmed.

Judgment affirmed.

...the necessary allegation. A demurrer was interposed to
the amended declaration and sustained, and the Appellate Court for
the Third District, in affirming the action of the trial court, held
that the bill as amended was defective in form and substance.
The bill, it was held, was defective in form because it failed to
state the cause of action with sufficient particularity, and it was
defective in substance because it failed to state the cause of action
with sufficient particularity. The bill, it was held, was defective
in form because it failed to state the cause of action with sufficient
particularity, and it was defective in substance because it failed to
state the cause of action with sufficient particularity. The bill, it
was held, was defective in form because it failed to state the cause
of action with sufficient particularity, and it was defective in substance
because it failed to state the cause of action with sufficient
particularity. The bill, it was held, was defective in form because it
failed to state the cause of action with sufficient particularity, and
it was defective in substance because it failed to state the cause of
action with sufficient particularity. The bill, it was held, was
defective in form because it failed to state the cause of action with
sufficient particularity, and it was defective in substance because it
failed to state the cause of action with sufficient particularity.

In our opinion the court erred in holding that the
bill as amended was defective in form and substance. The bill, it
was held, was defective in form because it failed to state the cause
of action with sufficient particularity, and it was defective in substance
because it failed to state the cause of action with sufficient
particularity. The bill, it was held, was defective in form because it
failed to state the cause of action with sufficient particularity, and
it was defective in substance because it failed to state the cause of
action with sufficient particularity. The bill, it was held, was
defective in form because it failed to state the cause of action with
sufficient particularity, and it was defective in substance because it
failed to state the cause of action with sufficient particularity.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

46 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff. 279 I.A. 6472

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 14 1935 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1934.

| | | |
|------------------|---|-------------------------|
| LAURA GOTTSCHKE, |) | |
| |) | |
| Appellee, |) | APPEAL FROM THE CIRCUIT |
| |) | |
| vs. |) | COURT OF HENRY COUNTY |
| |) | |
| CARL J. LAGER, |) | |
| Appellant. |) | |

DOVE, J.

On January 28, 1932 appellee filed in the Circuit Court of Henry County her bill of complaint in which she alleged that her husband died in 1911 and that as a result of the settlement of his estate she became the owner of eighty acres of land in Carroll County, Iowa, and two lots improved by dwellings in Coon Rapids, Iowa. The bill further alleged that Dora M. Lager was the sister of appellee and that appellant Carl J. Lager was her husband: that they were frequent visitors at appellee's home in Iowa where she then lived: that appellant was an experienced business man and because of that fact and her relationship to him she had great faith and confidence in him: that she was inexperienced in business affairs and soon after the death of appellee's husband, appellant and his wife commenced a course of persistent and continuous urging of her to turn over to them all the property she owned, except her clothing and household goods: that appellant and his wife insisted to appellee that she was not competent to manage her own business and that she could

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DIVISION

October Term, A. D. 1934.

APPEAL FROM THE CIRCUIT
COURT OF HENRY COUNTY

LEOLA COLEMAN,
Appellee,
vs.
EARL J. LAGER,
Appellant.

STATE 1.

On January 22, 1932 appellee filed in the Circuit Court of Henry County her bill of complaint in which she alleged that her husband died in 1911 and that as a result of the settlement of his estate she became the owner of eighty acres of land in Carroll County, Iowa, and two lots improved by dwellings in Coon Rapids, Iowa. The bill further alleged that Earl J. Lager was her husband; that of appellee and that appellant Earl J. Lager was her husband; that they were frequent visitors at appellee's home in Iowa where she then lived; that appellant was an experienced business man and because of that fact and her relationship to him she had great faith and confidence in him; that she was inexperienced in business affairs and soon after the death of appellee's husband, appellant and his wife commenced a course of persistent and continuous wronging of her to deprive her of all the property and money, and to deprive her of her home; that appellee and his wife insisted to appellee that she was not competent to manage her own business and that she could

not enjoy life unless she would turn over her lands to them, and in consideration of her doing so, appellant promised that he would hold the purchase price of said land in trust for appellee and that he would manage and control the same for her, pay out the purchase price for her support and maintenance as she might wish it, in such a manner as she should always have all the necessities and conveniences of life and money as she needed it without care or anxiety upon her part: that appellee believed said promises and relied on them and on April 1, 1915 executed and delivered a deed for the eighty acre tract to appellant Carl J. Lager and his wife Dora M. Lager: that the consideration there expressed in that deed and agreed to be paid was \$12,000.00, which was then the actual value of said land: that \$4,000.00 of said consideration was paid by the assumption by appellant and Dora M. Lager of the mortgage indebtedness and that the remaining \$8,000.00 was held by appellant in trust for appellee, the agreement being that it should be paid out to appellee as hereinbefore specified: that on April 3, 1916 appellee conveyed to Dora M. Lager, the then wife of appellant, the lots located in Coon Rapids, Iowa: that the consideration expressed in this deed and agreed to be paid was \$3200.00, which was the then value of the premises: that said consideration was to be held by appellant in trust for appellee to be paid out to and for her as hereinbefore specified: that at the time said conveyances were executed, appellee believed the promises of the grantees, relied upon them and would not otherwise have executed said conveyances: that upon the execution of said conveyances, the grantees entered into possession of the premises and have continued in possession hitherto: that appellant has never rendered an accounting of his trusteeship but has kept a part of the consideration deposited on interest bearing bank certificates and has loaned out other portions of the money of the consideration on interest and used a portion thereof

[illegible]

in his own business and has derived from the use of said funds a large amount of money in the form of interest and profits. The bill made Carl J. Lager a defendant, waived an answer under oath, and prayed that the trusteeship be terminated and for an accounting and that appellant be required in his answer to state all interest and profits he has received from the monies held in trust by him for appellee, state the present status of said trust, how much is on deposit, the rate of interest it is drawing and where it is deposited, also the amount of the trust fund which he has loaned out, to whom and on what security and at what rate of interest and the amount he has used or is using in his own business, and that he render a full and accurate accounting of all the amounts he has received and his expenditures, and that he be decreed to pay appellee the amount found due her upon such accounting. In addition, nineteen specific interrogatories were submitted to appellant to be answered.

On June 6, 1932 an answer was filed by appellant, which admitted that his then deceased wife was the sister of appellee, admits the death of appellee's husband in 1911 and that she became the owner of the eighty acres of land in Carroll County, Iowa, but states that it is subject to a mortgage of \$5,000.00. The answer admits that appellant and his wife visited at appellee's home both before and after the death of appellee's husband, denies that appellee was inexperienced in business affairs and states that prior to the conveyances mentioned in her bill, she managed and directed her property. In his answer, appellant stated that he has been engaged in the clothing business in Geneseo for more than fifty years and that his relations with appellee have at all times been friendly. He denied that he and his wife continuously urged appellee

his own business and has derived from the use of said funds a large amount of money in the form of interest and profits. The bill under Carl U. Lager a defendant, was answered under oath, and prayed that the trusteeship be terminated and for an accounting and that appellant be required in his answer to state all interest and profits he has received from the monies held in trust by him. Appellee, states the present status of said trust, how much is invested, the rate of interest it is drawing and where it is deposited, also the amount of the trust fund which he has loaned out, to whom and on what security and at what rate of interest and the amount he has used of it being in his own business, and that under a full and complete accounting of all the amounts he has received and his expenditures, and that he be decreed to pay appellee the amount found due her upon such accounting. In addition, fifteen specific interrogatories were submitted to appellant to be answered.

On June 8, 1933 an answer was filed by appellant, which admitted that his then deceased wife was the sister of appellee, that the death of appellee's husband in 1911 and that she became the owner of the eighty acres of land in Carroll County, Iowa, but stated that it is subject to a mortgage of \$3,000.00. The answer states that appellee and his wife visited at appellee's home both before and after the death of appellee's husband, denies that appellee was imprisoned in Indian prison and states that when in the prison was confined in 1911, she was not and is not now married. In his answer, appellant stated that he has been engaged in the electrical business in answer to some of the fifteen and that his relations with appellee have at all times been friendly. He denied that he and his wife continuously urged appellee

to turn over the property described in the bill to them, denies that he ever stated she was incompetent to manage her own business or that he ever made any representations that she could not gain any enjoyment from life unless she should convey her property to appellant, denied that he ever promised that if she did convey her property to him that he would put the purchase price in trust or that he would manage and control the same for her or use the same for her support and maintenance. Denies that he ever promised to pay the purchase price to her as she might wish, so that she would have, during all of her lifetime, all the necessities and conveniences of life without care or anxiety, denies that appellee ever relief upon any such promise and avers that none were ever made. In his answer he alleged that the eighty acres of land immediately prior to April 1st was run down and in need of extensive repairs: that shortly prior thereto there was a \$5,000.00 mortgage upon said premises bearing 8% interest: that the income from the premises was insufficient to pay this interest, taxes, insurance and other necessary repairs and expenses: that appellee repeatedly insisted and requested and importuned appellant and his wife to purchase the premises and proposed to sell the same to them for \$12,000.00, subject to said mortgage of \$5,000.00, which appellee agreed to reduce to \$4,000.00, and the balance of the purchase price, being \$8,000.00 should be paid appellee in payments as she requested and needed for living expenses, but not at a greater sum than \$30.00 per month and the balance should not bear interest: that it was in pursuance to this arrangement that the conveyance was made to appellant and his wife Dora M. Lager: that thereafter the grantees made payments to appellee and for her benefit, amounting to \$1678.63: that the parties

to turn over the property described in the bill to them, and that he ever stated she was incompetent to manage her own business and that he ever made any representations that she could not gain any enjoyment from life unless she should own or have property to appellant, denied that he ever promised that if she did convey her property to him that he would put the purchase price in trust or that he would manage and control the same for her or use the same for her support and maintenance. Denied that he ever promised to pay the purchase price to her as she might wish, so that she might retain all of her lifetime, all the necessities and conveniences of life without care or anxiety, denied that appellee ever relied upon any such promise and avers that none were ever made.

In his answer he alleged that the eighty acres at issue immediately prior to April 1st was run down and in need of extensive reclamation and shortly before there was a \$1,000.00 mortgage upon said

property bearing 8% interest; that the income from the premises was insufficient to pay this interest; that appellee repeatedly insisted that appellee pay the cost and expenses; that appellee repeatedly insisted that appellee and his wife to purchase the premises and proposed to sell the same to them for \$12,000.00, and to set to said mortgage of \$1,000.00, which appellee agreed to reduce to \$4,000.00, and the balance of the purchase price, being \$8,000.00 should be paid appellee in payments as she requested and needed for living expenses, but not at a greater sum than \$50.00 per month and the balance should not bear interest; that it was in pursuance to this arrangement that the conveyance was made to appellee and his

Wife, John W. Lewis, May 1st 1900, the income was to be paid to appellee and his wife, and the interest to be paid to appellee and his wife.

to said conveyance had settlements from time to time, which were approved by appellee and satisfactory to her up to April 1, 1919: that shortly after April 1, 1919 appellee became ill at her home in Carroll County, Iowa and desired to come to the home of appellant, and appellant and his wife Dora M. Lager thereupon went to Carroll County, Iowa and learned that a few days previously Emily Larson, another sister of appellee, had gone to Iowa and brought appellee to her home near Geneseo, against the will of appellee: that since that time appellee has never requested any money on said contract for the purchase of said land, that appellant and his wife repeatedly sought to ascertain whether she was in need of funds but that the said Emily Larson prevented appellant and his wife from seeing or having any conversation with appellee, but that Emily Larson told appellant and his wife that appellee did not need any money nor desire any from appellant: that since the settlement ⁱⁿ of April 1919, appellee had never requested appellant to pay any money to her: that the purchase of said farm was an ordinary sale made by appellee to appellant and his wife jointly and that he owns an undivided one-half interest in said land: that \$8,000.00 is not held by him in trust for appellee but that that amount is the balance of the agreed purchase price to be paid to appellee without interest, in payments of not more than \$30.00 per month whenever requested and needed by appellee: that Dora M. Lager died January 25, 1931 and appellant has been duly appointed administrator of her estate, that all payments were to be made jointly by appellant and his wife, and that, as administrator, appellant has never been made a party to this proceeding.

Upon information and belief, the answer of appellant states that about April 3, 1916 appellee conveyed to Dora M. Lager the premises

to said conveyance had settlement from time to time, which were approved by appellee and satisfactory to her up to April 1, 1919; that shortly after April 1, 1919 appellee became ill at her home in Carroll County, Iowa and desired to come to the home of appellant and appellant and his wife Dora M. Lager thereupon went to Carroll County, Iowa and learned that a few days previously Emily Larson, another sister of appellee, had come to Iowa and brought appellee to her home near Geneseo, against the will of appellee: that since that time appellee has never requested any money on said contract for the purpose of said land, that appellee and his wife have not been to ascertain whether she was in need of funds but that said Emily Larson procured appellant and his wife twice meeting or making any conversation with appellee, but that Emily later on told appellant and his wife that appellee did not need any money nor make any from appellant: that since the settlement of April 1, 1919, appellee had never requested appellant to pay any money to her: that the purpose of said land was an ordinary sale made by appellee to appellant and his wife jointly and that he was an authorized agent of appellant in said land, that he had sold it for \$10,000.00 in cash for appellee and that that amount is the balance of the amount due to be paid to appellee without interest, in payment of not more than \$30.00 per month whenever requested and needed by appellee: that Dora M. Lager died January 25, 1921 and appellant has been duly appointed administrator of her estate, that all payments now in his hands for said land and his wife, and that, as administrator, appellant has never been made a party to said settlement. Upon information and belief, the answer of appellant states that about April 1, 1919 appellee conveyed to Dora M. Lager the premises

in Coon Rapids, Iowa. He denies that he was made a trustee of any funds arising out of that transaction, avers that he was not connected in any manner or in any capacity with it and that the transaction was solely between appellee and her sister Dora M. Lager. The answer then alleges that the Coon Rapids, Iowa property was improved by two dwellings and that upon information and belief he states that appellee, by reason of kindnesses shown her by her sister, gave her sister Dora M. Lager one of the lots which was improved by a dwelling and that the other lot was to be sold by Dora M. Lager and the proceeds held by her for the use of appellee as she should require the money and request the same: that thereafter and with the consent of appellee, one lot was sold for \$1500.00 and that at the time of Dora M. Lager's death, Dora had in her possession for the use of appellee the sum of \$1338.90, represented by three certificates of deposit issued by the Farmers National Bank of Geneseo, Illinois in the name of appellee: that the balance, amounting to \$161.10, was held by Dora M. Lager for appellee: that appellant as administrator of his wife's estate, and not otherwise, has possession of the three certificates of deposit and of the said sum of \$161.10, which he offers to turn into court or to pay to anyone duly authorized to receive the same and that he has heretofore offered to turn over said certificates of deposit and cash upon receiving a proper receipt for the same: that he holds said certificates of deposit and money not as an individual but in his representative capacity and holds no sums or money individually or as trustee for appellee in connection with this transaction. Appellant in his answer denies that appellee would not have executed said deed except from the fact that she relied upon the representations of appellant and his wife, and states that Dora M.

... Coon Rapids, Iowa. He denies that he was made a trustee of
any funds arising out of that transaction, avers that he was not
connected in any manner or in any capacity with it and that the
transaction was solely between appellee and her sister Dora M.
Lager. The answer then alleges that the Coon Rapids, Iowa property
was improved by two dwellings and that upon information and belief
it stated that appellee, by reason of kindness shown her by her
sister, gave her sister Dora M. Lager one of the lots which was
improved by a dwelling and that the other lot was to be sold by Dora
Lager and the proceeds held by her for the use of appellee as she
was to require the money and request the same; that thereafter and
at the time of Dora M. Lager's death, Dora had in her possession for
the use of appellee the sum of \$1326.20, represented by three certi-
ficates of deposit issued by the Farmers National Bank of Waterloo,
Iowa in the name of appellee; that the balance, amounting to
\$151.10, was held by Dora M. Lager for appellee; that a will was
made by Dora M. Lager, and not otherwise, her possession
of the three certificates of deposit and of the said sum of \$151.10,
was an offer to turn into account or to pay to anyone duly authorized
to receive the same and that he has heretofore refused to turn over
the certificates of deposit and cash upon receiving a proper receipt
for the same; that he holds said certificates of deposit and money not
as an individual but in his representative capacity and holds no share
therein individually or as trustee for appellee in connection with
the transaction. Appellant in his answer denies that appellee would
have anything to do with the sale of the property and that she

Lager individually went into possession of the town property. He denies he obtained any profit from any trust funds, but alleges that the farm in Iowa has been a liability and not an asset and that during the period he and his wife were the owners thereof, more monies for upkeep and improvements have been paid out than received, that the farm is still a liability and that the mortgage has been increased from \$4,000.00 to \$5,000.00, the additional sum being expended thereon and in addition appellant expended more than \$5,000.00 of his own money in making necessary improvements over and above the rentals he received therefrom.

To this answer a general replication was filed, and on July 15, 1932 the cause was referred to a Special Master to take and report the testimony, together with his conclusions. Evidence was offered by the respective parties before the Master on various days, and on February 22, 1933 evidence in rebuttal was taken and appellee rested her case. With the record in this condition, appellee was granted leave to file an amendment to her bill and did so on April 5th, 1933, and no further evidence was offered thereafter.

By the amendment appellee charged that the grantees in the deed to the farm land promised to pay the consideration of 12,000.00 by assuming the payment of the \$4,000.00 mortgage thereon and pay the balance of \$8,000.00 in twelve years after the date of the deed with interest thereon, said interest to consist of payments of \$50.00 each and every month until the principal sum of \$8,000.00 was paid: that on April 3, 1916 appellee conveyed to Dora M. Lager the town lots in Coon Rapids, but avers that at that time she was sick and did not know or understand she was executing a deed to both of the town lots but thought she conveyed only one: that the consideration agreed to be paid by Dora Lager to appellee was \$3100.00

... individually went into possession of the land property. He
... he obtained any profit from any land, but since what
... there has been a liability and not an asset and that the
... the period he and his wife were the owners thereof, wife and
... and improvements have been paid out and received, that
... there is still a liability and that the mortgage has been increased
... \$1,000.00 to \$2,000.00, the additional sum being applied to the
... in addition of the amount of \$1,000.00 of his own
... in making necessary improvements over and above the rentals he

... To this extent a general resolution was made, and on July
... 1933 the same was referred to a Special Master to take and report
... together with his conclusions. Witnesses were ordered
... the respective parties before the Master on various days, and in
... 1933 evidence in respect to the matter was taken and applied to the
... With the record in this condition, the case was referred
... to file an amendment to her bill and did so on April 26,
... and no further evidence was offered thereon.

By the amendment appellee charged that the proceeds in the
... the farm land promised to pay the consideration of \$2,000.00
... the payment of the \$2,000.00 balance thereon and pay the
... \$2,000.00 in twelve years after the date of the deed with
... said interest to consist of payments of \$20.00 each
... until the principal sum of \$2,000.00 was paid: That
... 1918 appellee conveyed to John W. Taylor the farm land
... but that he was not to have any interest in the land until
... and that the proceeds were to be paid only once and no interest
... to be paid by John Taylor to appellee was \$200.00

when Dora would be able to pay: that appellee has ratified and does ratify said deed as to both properties. That in 1929 Dora M. Lager sold one of the houses for \$1500.00, deposited the proceeds in the Farmers National Bank of Geneseo on a certificate or certificates of deposit payable to appellee in part payment of the sum which she owed appellee. That appellant secured possession of said certificates, renewed them from time to time, added accumulated interest thereto and now has said certificate or subsequent renewals thereof. That during the lifetime of Dora M. Lager, she and appellant made numerous \$30.00 monthly payments of interest by depositing the same in the Farmers National Bank of Geneseo in the name of appellee, they themselves retaining the certificates: that the deposit of such interest payments in said bank was at the express request of appellee: that shortly prior to the death of Dora M. Lager, appellant withdraw a large part of the money so deposited and redeposited it in his own name and has possession of the certificates of deposit evidencing the same. That appellant and his wife made certain interest payments to appellee and paid out certain moneys for her benefit, but appellee has no account thereof: that appellant holds the money so deposited as a trustee and should be required to account therefor and prays for an accounting as to the balance of the purchase price of the farm and for the payment of \$1500.00 received by Dora M. Lager as the purchase price of one of the dwellings and deposited by her in the name of and for the benefit of appellee and now in the possession of appellant.

Appellant answered the bill as amended, denying that the consideration for the farm was ever agreed to be payable at the end of twelve years after the date of the deed or that the ~~payment~~^{interest} thereon was to consist of \$30.00 per month until the payment of

... that she would be able to pay; that appellee has testified and the
... fully paid as to both provisions. That in 1928 Dora M. Leger
... of the house for \$1500.00, deposited the proceeds in the
... National Bank of Kansas on a certificate or certificate
of deposit payable to appellee in full payment of the sum which she
... appellee. That appellee received possession of said certifi-
... from time to time, added accumulated interest
... and now has said certificate or subsequent renewal thereof.
... during the lifetime of Dora M. Leger, she and appellee made
... monthly payments of interest by depositing the same
... National Bank of Kansas in the name of appellee,
... themselves retaining the certificates; that the deposit of
... interest payments in said bank was at the express request
... that appellee was to receive the same as interest.
... appellee withdrew a large part of the money so deposited and
... deposited it in his own name and has possession of the certifi-
... of deposit evidencing the same. That appellee and his wife
... certain interest payments to appellee and paid out certain
... for her benefit, but appellee has no account thereof; that
... holds the money so deposited as a trustee and should be
... to account therefor and pays for an accounting as to the
... of the purchase price of the farm and for the payment of
... received by Dora M. Leger as the purchase price of one of
... and deposited by her in the name of and for the bene-
... of appellee and now in the possession of appellee.
... Appellant answered the bill as amended, denying that the
... for the farm was ever agreed to be payable at the end
... years after the date of the deed or that the payment
... was to consist of \$30.00 per month until the payment of

\$8,000.00 was made. Denies that at the time the deeds for the town property were made to Dora Lager that appellee was ill and did not understand she was executing a deed or that the deed she did execute only conveyed one of said lots, but alleges that appellee intended to convey both lots, one as a gift to Dora from her sister for past services in settlement of their father's estate and the other was to be held by Dora for sale and when sold the proceeds to be held by Dora and given to appellee from time to time as she should advise Dora she needed the same: that up to the time of the institution of this suit, appellee never requested appellant or Dora M. Lager to turn over to appellee any of said funds which they held. Denies that the deposits that were made in the bank were payments of interest or made by appellee or at her request or direction, but avers that the deposits were made in the name of appellee by appellant and his wife for the purpose of keeping them separat and apart from other funds of theirs, except that the \$1500.00 was money derived from the sale of one of the town lots and belonged to appellee. That as to the farm his agreement was to pay the \$8,000.00 in installments of not more than \$30.00 per month as appellee should request: that he has paid to her \$1678.63 and is ready to pay the balance in sums not exceeding \$30.00 per month whenever he is furnished with a proper acquittance. By his answer, appellant insists that appellee has a complete remedy at law and that this suit lacks a proper party defendant as the estate of Dora M. Lager is not represented.

The Special Master found that sometime prior to April 1, 1915 appellee was the owner of the Iowa farm and she and appellant entered into an oral agreement, by the terms of which appellant agreed to purchase the farm for \$12,000.00 and to pay therefor by

8,000.00 was made. Denied that at the time the bank had the loan properly made to Don Leger that appellee was ill and that he understood she was executing a deed or that she had the authority to convey both lots, one or a bill to convey them but either way he was in settlement of their father's estate and she should give him and give to appellee from time to time as she should advise him she needed the same; that up to the time of the installation of the appellee's father's estate, appellee was not in the bank to execute that were made in the bank were payments of interest or made by appellee or his father on direction, but even so the deposits were made in the name of appellee by appellee and his wife for the purpose of paying the interest on the loan. Denied that appellee, except that the \$1500.00 was money received from the sale of one of the lots and belonged to appellee. That up to the time the agreement was to pay the \$2,000.00 in installments of \$100.00 per month the appellee should request that he was to pay \$150.00 and is ready to pay the balance in cash and executing a deed for the same. Denied that appellee was a co-owner of the lot and that this was a proper conveyance of the same. Denied that M. Leger is not represented.

assuming a mortgage of \$4,000.00 thereon and the balance of \$8,000.00 he was to pay twelve years thereafter, interest upon said sum of \$8,000.00 to be paid monthly at the rate of \$40.00 per month until the \$8,000.00 was paid. That in pursuance of that agreement appellee conveyed said farm to appellant and his wife by a warranty deed dated April 1, 1915, which was thereafter on November 27, 1915 duly recorded in Carroll County, Iowa. That on September 1, 1916 the grantees in said deed commenced paying interest and from that date until about December 1, 1931 continued to make interest payments by purchasing certificates of deposit in the name of appellee at the Farmers National Bank of Geneseo, Illinois, appellant and his wife retaining the certificates of deposit in their possession: that up to 1925 most of the payments were made by Dora M. Lager and after that time by appellant: that most of the payments were for \$30.00 but sometimes were more and sometimes less than that amount and were not made each month but from time to time: that the deposits were made at the request and direction of appellee: that from time to time these certificates were surrendered by appellant and his wife and renewals issued adding accumulated interest thereon: that on January 22, 1931, as a result of these payments, there was on deposit in said bank the sum of \$5137.94 represented by six certificates of deposit, of which \$3893.82 represented interest on said purchase price of \$8,000.00 and \$1294.12 represented accumulated interest on said payments: that on January 22, 1931 appellant endorsed the name of appellee upon each of said certificates, surrendered them to the bank and deposited the proceeds in said bank in his own name and now retains the same and holds said amount in trust for appellee and should account to her for said sum, together with 5% interest

amounting a mortgage of \$4000.00 thereon and the balance of
 \$1,000.00 he was to pay twelve years thereafter, interest upon said
 sum of \$8,000.00 to be paid monthly at the rate of \$0.00 per month
 until the \$8,000.00 was paid. That in pursuance of that agreement
 appellee conveyed said farm to appellant and his wife by a warranty
 deed dated April 1, 1915, which was recorded on November 27,
 1915 duly recorded in Carroll County, Iowa. That on September 1,
 1915 the grantee in said deed commenced paying interest and from
 that date until about December 1, 1921 continued to make interest
 payments by purchasing certificates of deposit in the name of
 appellee at the Farmers National Bank of Geneseo, Illinois, appellant
 and his wife retaining the certificates of deposit in their possession;
 that up to 1925 most of the payments were made by John H. Brown and
 after that time by appellant; that most of the payments were for
 \$10.00 but sometimes were more and sometimes less than that amount
 and were not made each month but from time to time; that the deposits
 were made at the request and direction of appellee; that from time
 to time these certificates were surrendered by appellant and his
 wife and receipts issued and deposited in their treasury; that
 on January 22, 1921, as a result of these payments, there was on
 deposit in said bank the sum of \$2137.94 represented by six certifi-
 cates of deposit, of which \$2338.00 represented interest on said prin-
 cipal price of \$8,000.00 and \$1934.12 represented accumulated in-
 terest on said principal; that on January 22, 1921 appellant and
 the two of appellee upon each of said certificates, surrendered them
 to the bank and deposited the proceeds in said bank in his own name
 and was retaining the same and holds said amount in trust for appellee
 and to hold account to her for said sum, together with 5% interest

thereon from January 22, 1931: that from April 1, 1915 to 1919, appellant advanced and paid to appellee or for her benefit and use \$872.79 and should be given credit therefor as payments on the interest of \$30.00 per month. As to the other property, the Special Master found that on April 3, 1916 appellee sold and conveyed to Dora M. Lager the two lots in Coon Rapids, Iowa, each improved by a dwelling, for \$3100.00, said Dora M. Lager agreeing to pay therefor when she would be able: that between 1927 and 1930, Dora M. Lager sold one of the lots and thereafter made certain payments to appellee by depositing in the Farmers National Bank certain sums and purchasing certificates of deposit in the name of appellee: that on January 22, 1931 there were outstanding four such certificates of deposit aggregating \$1271.36 and on that date appellant had possession of these certificates and has renewed them from time to time and had the accumulated interest added thereto until September 21, 1932 when there were outstanding three certificates of deposit in the name of appellee aggregating \$1342.62: that appellant, on said September 21, 1932, surrendered these certificates to the bank, added thereto the sum of \$157.38 and purchased from the bank a certificate of deposit for \$1500.00 in the name of appellee, which certificate appellant now holds in trust for appellee.

The Special Master further found that the material allegations of the amended bill of complaint are true and recommended a decree directing appellant to deliver to appellee said certificate of deposit for \$1500.00, and to pay appellee \$15,659.42 with interest from August 7, 1933, the date of the Master's report. The account as stated by the Master charges appellant with the balance of the purchase price of the farm, being \$8,000.00, computes interest thereon at \$30.00 per month from April 1, 1915 to July 21, 1933, being \$6,591.00, charges

thereon from January 22, 1931: that from April 1, 1915 to 1916, appellant advanced and paid to appellee or for her benefit and use \$372.79 and should be given credit therefor as payments on the interest of \$30.00 per month. As to the other property, the Special Master found that on April 3, 1915 appellee sold and conveyed to Don M. Lager the two lots in Coon Rapids, Iowa, each improved by a building, for \$100.00, and Don M. Lager agreeing to pay therefor and she would be paid: that between 1927 and 1930, Don M. Lager sold one of the lots and thereafter made certain payments to appellee by depositing in the Farmers National Bank certain sums and purchasing certificates of deposit in the name of appellee: that on January 22, 1931 there were outstanding four such certificates of deposit aggregating \$171.35 and on that date appellant had possession of these certificates and he received from her the sum of \$100.00 when she advanced interest added thereto until December 31, 1932 when there were outstanding three certificates of deposit in the name of appellee aggregating \$182.82: that appellee, on said December 31, 1932, surrendered these certificates to the bank, added thereto the sum of \$127.35 and purchased from the bank a certificate of deposit for \$309.00 in the name of appellee, which certificate of deposit now exists in trust for appellee.

The Special Master further found that the material allegations of the amended bill of complaint are true and recommended a decree directing appellee to deliver to appellant said certificate of deposit for \$309.00, and to pay appellee \$13,639.48 with interest from January 1, 1931, the date of the Master's report. The account as stated by the Master charges appellant with the balance of the purchase price of the farm, being \$3,000.00, computes interest thereon at \$30.00 per month from April 1, 1915 to July 31, 1932, being \$6,591.00, charges

him also with interest accumulated upon the interest payments amounting to \$1294.12 and interest on the \$5187.94 from January 22, 1931 to July 21, 1933 at 5%, being \$647.00. These several items aggregate \$16,532.12. Appellant is credited with the payments made to appellee amounting to \$872.70, leaving the said sum of \$15,659.42 due appellee.

Objections, which were renewed as exceptions, were filed to this report and overruled and a decree rendered in accordance with the recommendations of the Special Master. In the decree, however, the interest upon the \$8,000.00 was computed to May 17, 1934, aggregating \$6885.00, and the interest on the \$5187.94 was computed at 5% from January 22, 1931 to May 17, 1934, making \$861.05, so that appellant was charged with \$17,040.17 and credited with \$872.70, leaving a balance of \$16,167.47, of this amount \$5,187.94 was found to be represented by a certificate of deposit issued by the First National Bank of Geneseo, dated January 22, 1931. The decree directed appellant to endorse this certificate and deliver it to the clerk of the court for the use of appellee and decreed that he pay appellee the balance, amounting to \$10,978.53 within twenty days, and directed also that appellant deliver to the clerk for the use of appellee the certificate of deposit issued by the First National Bank of Geneseo, dated September 21, 1932 for \$1500.00, and which is payable to appellee. From this decree this appeal has been prosecuted and the record is before us for review.

While the record in this case is rather voluminous, the abstract thereof consisting of 319 pages, and the briefs of counsel rather involved, there are only a few controlling issues presented to this court for determination, and inasmuch as the transactions in connection with the purchase of the farm and town property were separate and distinct and made at different times and with different individuals, we will take each of them up separately.

[illegible]

The evidence discloses that appellee is a sister-in-law of appellant and at the time of her husband's death, lived in Carroll County, Iowa and was fifty-four or fifty-five years of age at that time. Four years later she sold her farm of eighty acres, which she acquired upon the death of her husband, and executed a deed therefor to appellant and her sister Dora, who was the wife of appellant. There is no dispute that the purchase price therefor was \$12,000.00 and that one-third of the purchase price was paid by the assumption of a \$4,000.00 mortgage, then a lien upon the land. The disputed point in issue is whether the remaining \$8,000.00 was to be paid with interest or without interest.

In support of the allegations of appellee's original bill, she called appellant as a witness and he testified that at the time of the hearing he was seventy-nine years of age, was then a merchant in Geneseo and had been in business there for fifty-seven years: that appellee first suggested to him and his wife that they purchase the farm, as the buildings thereon were in a bad state of repair and that the farm needed some man to take charge of it: that it then rented for \$400.00 cash per year, of which amount \$240.00 was paid by her for interest on the \$4,000.00 mortgage and that the taxes, insurance and upkeep consumed the balance. Appellant further stated that appellee then stated that she didn't have much to live on and that if appellant and his wife would pay her \$30.00 a month on the principal, when she needed it, and without interest, she would sell the farm to them: that the agreement was that the deed would be made to appellant and his wife and they would assume the payment of the \$4,000.00 mortgage and pay appellee \$8,000.00 without interest, said \$8,000.00 to be paid appellee whenever she needed or requested it, but not to exceed \$30.00 per month.

Appellee then testified as a witness in her own behalf and after stating her name and age, her counsel then asked her if she was the complainant in this case and she answered in the affirmative. The next question propounded to her was: "Before signing over your Iowa farm to Mr. and Mrs. Lager, did you have a talk with them about the payment of interest on the purchase price?" An objection was interposed which was overruled, but appellee did not answer the question. Her counsel, however, assumed in the next question that such a talk was had, as he inquired: "Where did you have that talk, at their home in Geneseo?" She answered in the affirmative and stated Mr. and Mrs. Lager were present. She was then asked: "How long was that before you deeded over the farm to them?" and she answered: "Sometimes I know and then again I can't think of it". After again being asked the question she stated she "guessed" it was a couple or three months. Her counsel then asked her: "Now tell us Mrs. Gottsche, just what Mr. and Mrs. Lager said about interest?" and she answered: "They said they would pay me \$30.00 every month till the capital was paid". She was then asked: "When did they say that they would pay the capital?" and she answered: "In twelve years they would pay me the capital, what was coming to me then". This was all of her testimony on direct examination. Upon cross examination she was asked: "You was to get \$30.00 a month until the capital was paid. Now who said that?" and she answered: "They said that". And again: "What rate was the interest to be figured at on this \$8,000.00. How much per cent?" and she answered 8%. She was then asked: "Did Dora say they would pay 8%?" and she answered: "I suppose she did". She then testified that she got the interest money every month at the bank, and when asked how long she got it at the bank said she couldn't remember. She further testified that

Appellee then testified as a witness in her own behalf and
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 the payment of interest on the purchase price?" In objection was
 in response which was overruled, but appellee did not answer the
 question. Her counsel, however, examined in the next question that
 such a talk was had, as he inquired: "Here did you have that talk,
 at their home in Geneva?" She answered in the affirmative and
 stated Mr. and Mrs. Lager were present. She was then asked: "How
 long was that before you decided over the farm to them?" and she an-
 swered: "Sometimes I know and then again I can't think of it." After
 again being asked the question she stated she "missed" it was a
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 the capital was paid. Now who said that?" and she answered: "They
 said that". And again: "What rate was the interest to be figured
 at on this \$8,000.00. How much per cent?" and she answered 3%. She
 was then asked: "Did they say they would pay 3%?" and she answered:
 "I suppose she did". She then testified that she got the interest
 every month at the bank, and when asked how long she got it
 at the bank said she couldn't remember. She further testified the

appellant bought the farm on time, but she never got any money for it. She was then asked ; "None at all?" and she replied: "I got \$5.00 or so now and then". She was then asked: "How much did you get altogether" and she answered: "Five Dollars was all I got". To the question: "Did you send them your bills and ask them to pay them?", she replied: "They had to pay the bills". She refused to answer the question as to why they had to pay the bills and was unable to state anything else that appellant or Mrs. Lager ever said about the farm and stated that she was nervous and that her memory was not good the day she was testifying. Later she was asked: "Was ~~that~~ \$30.00 to be payable when you asked for it?", and she replied: "Yes, but I didn't ask for it". She was then asked: "And you haven't asked for any money since you have been with your sisters?", and she replied: "No, I haven't." She was then asked: "Have you asked for any sum of money of either Carl Lager or your sister, Dora, that you didn't get?". She did not answer this question, and the Master then asked her: "Did you ever ask Mr. and Mrs. Lager for any money?", and she replied: "Not very much, very little I asked for". She was then asked: "did you ask for any at all?", and she replied: "Once in a while, I got very little". Question: "Did you get it when you asked for it?". Answer: "Sometimes". Question: "When did they refuse to give it to you?". Answer: "You are asking too much". Question: "This is your case, you brought it?". Answer: "I did not". And to the question whether her sisters brought it, she refused to answer.

The record discloses that the sisters referred to were Emily and May Larsen. In February, 1916 appellee wrote them, stating that she desired them to understand that appellant and his wife

appellant brought the farm on time, but she never got any money
 for it. She was then asked: "When at all?" and she replied:
 "I got \$2.00 or so now and then". She was then asked: "How much
 did you get altogether?" and she answered: "Five dollars was all
 I got". To the question: "Did you send them your bills and ask
 them to pay them?" she replied: "They had to pay the bills".
 She refused to answer the question as to why they had to pay the
 bills and was unable to state anything else that would account for this.
 Later even said about the farm and stated that she was nervous and
 that her memory was not good the day she was testifying. Later she
 was asked: "Was that \$20.00 to be payable when you asked for it?"
 and she replied: "Yes, but I didn't ask for it". She was then
 asked: "And you haven't asked for any money since you have been with
 your sisters?" and she replied: "No, I haven't". She was then
 asked: "Have you asked for any sum of money of either Carl Lager
 or your sister, Nora, since you didn't get it?" She did not answer
 this question, and the Master then asked her: "Did you ever ask
 Mr. and Mrs. Lager for any money?" and she replied: "Not very
 much, very little I asked for". She was then asked: "Did you ask
 for any at all?" and she replied: "Once in a while, I got very
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 Answer: "Sometimes". Question: "When did they refuse to give it
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 is your case, you brought it?" Answer: "I did not". And to the
 question whether her sisters brought it, she refused to answer.
 The record discloses that the sisters referred to were
 Carl and Mrs. Lager. In testimony, this is called Mrs. Lager, and
 it was she desired them to understand that appellant and his wife

had not taken her farm from her, but that it was so run down that it takes a man to run it and that she had asked them to buy it: that they did not care to do so but to please her they did: that appellant and his wife (referred to in this letter as Carl and Dora) had been very kind to her and that Dora was a noble woman but that Emily and May had not been kind to her and she hoped they would let her alone and never cross her path. Subsequently, in June, 1919, appellee, who was then living in Iowa, became ill and Emily received notice thereof from a neighbor and went to Iowa and brought appellee to her farm near Geneseo, where she has since remained. Appellant and his wife also, upon learning that appellee was ill in Iowa went there, but found that a day or so previous she had been removed to Illinois by Emily. Appellant insists that from this time in 1919 until the death of Dora Lager on January 25, 1931, appellee was kept a virtual prisoner at Emily and May Larson's and appellant and his wife were both prevented from seeing or communicating with her. What the attitudes of the several Larson sisters were toward each other is not very material. It does appear, however, that Emily and May were present at the hearings before the Master, although they did not testify. During the examination of appellee, these sisters sat near her and while the record does not disclose what they said or did, it does disclose that upon different occasions they, in some way, interfered with the witness or interrupted the proceedings. For instance appellee had testified that she was getting \$30.00 a month interest and had said she got it every month at the bank and counsel for appellant then asked her: "Did you collect it at the bank?" The record then states that at this point the sisters of the witness interfere. This happened not only once, but five times during her examination, the record in each instance stating: "At this

and not taken her from her, but that it was so much later
it takes a man to run it and that she had asked them to buy it;
that they did not care to do so but the police got them to sell
appellant and his wife (petitioned to in this letter as John and
Doris) had been very kind to her and that John was a good man
but that Emily and her had not been kind to her and the money they
would let her alone and never lose her again. Subsequently, in
June, 1919, appellant, who was then living in Iowa, became ill and
Emily received notice thereof from a neighbor and went to Iowa and
brought appellant to her home near Kansas, where she has since re-
mained. Appellant and his wife also, upon learning that appellant
was ill in Iowa went there, but found that a day or so previous
she had been removed to Illinois by Emily. Appellant insists that
from this time in 1919 until the death of John in January, 1921,
1921, appellant was kept a virtual prisoner at Emily and Mary Larson's
and appellant and his wife were both prevented from seeing or com-
municating with her. That the attitudes of the several Larson sisters
were toward each other is no very material. It does appear, however,
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these sisters sat near her and while the record does not disclose
what they said or did, it does disclose that upon different occasions
they, in some way, interfered with the witness or interrupted the
proceedings. For instance appellant had testified that she was getting
\$30.00 a month interest and had said she got it every month at the
bank and counsel for appellant then asked her: "Did you call it in
at the bank?" The record then states that at this point the sisters
of the witness intervened. This happened not only once, but five times
during her examination, the record in each instance stating: "At this

point a sister of the witness interrupts" or "At this point sisters of the witness interfere" or "At this point in the testimony a sister of the witness interrupted". Counsel for appellant requested that the sisters be segregated in another room or separated from the witness but his request was denied.

Appellant offered in evidence a letter written by appellee to her sister Dora, signed by appellee and dated July 29, in which she said: "tell Carl not to send no more money till I want it but put it in the bank to draw interest for I got plenty now". Another letter offered in evidence by appellant was written by appellee to her sister Dora, dated May 23, in which appellee requested her to send her a check for thirty dollars, the June money. These letters, from all the evidence, were probably written in 1916, although the year does not appear therein.

The evidence further discloses that on August 2, 1916 either appellant or his wife deposited \$30.00 in the Farmers National Bank of Geneseo and as evidence thereof received a certificate of deposit from the bank, reciting that appellee had deposited that sum, which was payable to the order of herself upon the return of the certificate properly endorsed by her six months after date, with 4% interest: that from that date until December 1, 1931 further deposits were made by them and in each instance like certificates of deposit were received from the bank, that most of the sums so deposited were \$30.00, but sometimes more, and at other times less, the deposits not being made each and every month but from time to time: that when a certificate matured, it was surrendered to the bank and a new certificate issued, the accrued interest being added to the new certificate. Three days prior to the death of his wife, appellant surrendered six certificates of deposit to the bank, which had been previously issued to him but which stated that appellee had made such deposit and received in lieu

point a sister of the witness interviewed on "At this point a sister of the witness interviewed on "At this point in the testimony a sister of the witness interviewed. Counsel for appellant requested that the sisters be segregated in another room or separated from the witness but his request was denied.

Appellant offered in evidence a letter written by appellee to her sister Bern, dated July 22, in which she said: "Tell Earl not to send me more money until I want it but let it in the bank to draw interest for I got plenty now." Another letter offered in evidence by appellee was written by appellee to her sister Bern, dated July 22, in which appellee requested her to send her a sum of money. These letters, like the others, were probably written in 1912, although the year does not appear therein.

The evidence further discloses that on August 2, 1912 appellant or his wife deposited \$50.00 in the Farmers National Bank of Geneseo and as evidence thereof received a certificate of deposit from the bank, reciting that appellee had deposited that sum, which was payable to the order of herself upon the return of the certificate properly endorsed by her six months after date, with 4% interest; that from that date until December 1, 1921 further deposits were made by them and in each instance the certificates of deposit were received from the bank, that most of the same no deposits were \$50.00, but sometimes more, and at other times less, the deposits not being made each and every month but from time to time; that when a certificate was returned to the bank and a new certificate issued, the accrued interest being added to the new certificate. These facts were in the hands of the jury, and the testimony was sufficient to show that the bank had been properly running in 1912 and that appellee had been duly deposited and removed in 1921.

thereof six other certificates of deposit payable to his own order. These certificates aggregated \$5187.94, of which amount \$1294.12 represents accrued interest upon certificates of deposit, issued by the bank to appellant in the name of appellee.

Several contentions were made by appellant why this decree should be reversed, none of them need be considered however except his contention that the evidence does not support the decree as rendered. We have set forth in this opinion the pleadings and the evidence at considerable length and have read this record with care. The evidence does not satisfy our minds that appellant was to repay the principal in twelve years or that he agreed to pay thirty dollars interest each month upon this \$8,000.00. In her original bill, appellee made no such contention. She said nothing about when the principal was to be repaid or about any interest or about thirty dollars a month to be paid, but charged that appellant's agreement was to hold the \$8,000.00 for her and pay it to her as she might need and request it. She charged that appellant had kept a portion of this sum deposited in interest bearing certificates and a part thereof she alleged he had loaned out on interest and the balance she stated he had used in his own business and sought to have him account for the interest he had received and profits which had accrued to him. In his answer to the original bill, appellant stated that the contract was that he was to pay the \$8,000.00 to appellee whenever requested by her and as needed by her, but at a rate not to exceed \$30.00 per month. This is the first time any reference was made to the payment of this sum or any sum per month. Furthermore, appellee called appellant as her witness, thereby vouching for his truth. The record discloses that his evidence was taken September 20, 1932 and that at the conclusion of his testimony a recess was taken and appellee testified on October 27, 1932. The fourth question asked her was to inquire whether she had a talk with

showed six other certificates of deposit payable to his own order.
 These certificates numbered 8187, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

appellant and his wife about the payment of interest on this \$8,000.00. At that time whether appellant and his wife had or had not agreed to pay interest was not, under the pleadings, in issue. A consideration of all her evidence upon this feature of the case is neither satisfactory or convincing, and the statements she did make concerning the payment of interest and principal was not in any way corroborated. Her counsel calls our attention to her mental and physical condition as an excuse for the unsatisfactory character of her evidence. We recognize that she was an elderly lady and her letters indicate that she had little education, but these facts do not excuse her from proving her case as stated in the pleadings by a preponderance of the evidence. The evidence did substantiate the allegation of her original bill to the effect that this \$8,000.00 was to be held by appellant and was to be paid out by him to her for her support and maintenance as she might need it, and it also supported her charge that appellant kept a part of this money deposited in interest bearing bank certificates, but there was no proof that he loaned any part of it to other parties or that he used any portion of it in his own business. Upon the issues raised by the amended bill and answer which were whether appellant was to pay the \$8,000.00 twelve years after the date of the conveyance and whether in the meantime he was to pay her \$30.00 interest per month, we are of the opinion that appellee has not proved the affirmative of these issues by a preponderance of the evidence, but from all the evidence we hold that the contract was, as she stated in her original bill, and that is that appellant was to hold this \$8,000.00 and pay it out to her for her support and maintenance as she might need and request it. There is no evidence that she ever requested of appellant or his wife anything which she did not receive and unless there was an agreement that appellant was to pay interest, he should not be charged therewith. Her letter of July 29, herein referred to, is consistent with the allegations of her original bill and with appellant's contention as to what

applicant and his wife about the payment of interest on this \$8,000.00.
It was stated whether applicant and his wife had or had not agreed to
pay interest was not, under the pleadings, in issue. A constitutional
all her evidence upon this feature of the case is neither material
any or convincing, and the testimony she did give concerning the pay-
ment of interest and principal was not in any way corroborated. Her
evidence calls our attention to her mental and physical condition as an
evidence for the necessity of character of her evidence. It is recognized
that she was an elderly lady and her testimony is that she had
little education, but these facts do not prevent her from giving her
evidence as stated in the pleadings by a representation of the evidence.
The evidence did substantiate the allegation of her own mind will be
the effect that this \$8,000.00 was to be paid by applicant and was to
be paid out by him to her for her support and maintenance as she might
need it, and it also appeared that applicant kept a part
of this money deposited in interest bearing bank certificates, but there
was no proof that he was any part of it to other parties at that he
was any portion of it in his own business. Upon the issues raised by
the amended bill and answer which were whether applicant was to pay the
\$8,000.00 twelve years after the date of the conveyance and whether in
the meantime he was to pay her \$20.00 interest per month, we are of the
opinion that applicant has not proved the affirmative of these issues by
a preponderance of the evidence, but from all the evidence we hold that
the contract was, as she stated in her original bill, and that is that
applicant was to hold this \$8,000.00 and pay it out to her for her
support and maintenance as she might need and demand it. There is
no evidence that she ever requested of applicant or his wife anything
which she did not receive and which there was an agreement that ap-
plicant was to pay interest, he should not be charged therewith. Her
letter of July 29, herein referred to, is consistent with the allega-
tions of her original bill and with applicant's contention as to what

the contract was. Appellant's conduct in making deposits and taking certificates of deposit issued to her does not prove that he was to pay her interest on the \$8,000.00 at the rate of \$30.00 per month. He knew that she could have required him to pay her \$30.00 per month, and he evidently has been sending her some money prior to the time she wrote the letter of July 29, because she requested him not to send any more until she wanted it, but to put it in the bank to draw interest. This he did and continued to do ^{and} for this reason, and in our opinion, appellee is entitled to receive the accumulated interest upon these various certificates of deposit, which the evidence discloses amounted to the sum of \$1294.12.

In our opinion appellant should, in this proceeding, be charged with said sum of \$8,000.00. He should also be charged with the accumulated interest on the various certificates of deposit which he had issued to appellee and which on January 22, 1931 amounted to \$1294.12. He should also be charged with interest, as evidenced upon the certificates of deposit issued on January 22, 1931 to January 28, 1932, the date this suit was instituted @ 4%, approximately \$207.51. These sums aggregate \$9501.63 and appellant should be charged with interest upon this amount from January 28, 1932 to the date of the entry of a final decree herein at the rate of 5% per annum.

In Appellant's answer he alleged that he paid to and expended for appellee the sum of \$1678.63, but upon the hearing he was only able to produce checks, receipts and book entries showing the payment to her of \$872.70 and the finding of the Special Master and the decree of the court was that he was entitled to credit for this amount. While appellant testified that he paid appellee and bills for her to the amount stated in his answer and that some of his cancelled checks were not

the contract was. Appellant's conduct in making deposits and taking
certificates of deposit issued to her does not prove that he was to
pay her interest on the \$2,000.00 at the rate of \$20.00 per month.
He knew that she could have required him to pay her \$20.00 per month,
and he evidently has been sending her some money prior to the time
she wrote the letter of July 27, because she required him not to
send any more until she wanted it, but to put it in the bank to draw
interest. This he did and continued to do for this reason, and in
our opinion, appellee is entitled to receive the accumulated interest
upon these various certificates of deposit, which the evidence discloses
amounted to the sum of \$1894.12.

In our opinion appellant should, in this proceeding, be
charged with said sum of \$2,000.00. He should also be charged with
the accumulated interest on the various certificates of deposit which
he had issued to appellee and which on January 23, 1931 amounted to
\$1894.12. He should also be charged with interest, as evidenced upon
the certificates of deposit issued on January 23, 1931 to January 23,
1932, on the sum of \$2,000.00, at the rate of 6% per annum.

These sums aggregate \$2901.82 and appellant should be charged with
interest upon this amount from January 23, 1932 to the date of the entry
of a final decree herein at the rate of 6% per annum.

In Appellant's answer he alleged that he paid to and received
for appellee the sum of \$1476.55, but upon the hearing he was only
able to produce checks, receipts and book entries showing the payment
of the sum of \$1476.55 and the balance of the Special Master and the court
of the court was that he was entitled to credit for this amount. While
appellant testified that he paid appellee and bills for her to the amount
stated in his answer and that some of his cancelled checks were not

available because of the closing of the Genesee Savings bank, upon which some of the checks were drawn, yet that happened before his answer was filed and he did not produce any records of any kind or character which substantiated his statement in this respect, nor did he explain the source from which the list of items of expenditures contained in his answer was derived. In our opinion appellant is in no position to complain of the amount of the credit to which he was entitled as found by the decree.

In the original bill appellee alleged that the consideration for the conveyance of the lots in Coon-Rapids was \$3200.00 and charged that this amount was likewise held in trust by appellant and was to be paid out by him to her for her support and maintenance as she might need it. In his answer, appellant insisted that he was not connected with this conveyance, that it was a transaction solely between appellee and her sister, Dora M. Lager, and that upon information and belief he stated that one lot was a gift to his wife from appellee and that the agreement was that one lot was to be sold and when sold Dora was to hold the proceeds for appellee and until appellee should request the same. In her amended bill appellee charged she was sick at the time this conveyance was made: that she thought she was conveying one lot: that the consideration was \$3100.00 to be paid by Dora Lager when she was able to pay: that one lot had been sold for \$1500.00, which was deposited in the bank and certificates of deposit issued therefor and charges that appellant has secured possession of these certificates. The evidence is that the deed conveying these lots to Dora M. Lager was executed on April 3, 1916. Appellee testified that appellant had nothing to do with this conveyance and "at the time the deed was made, I didn't have an agreement with Dora. She could do just as she wanted to". The grantee in this deed died intestate on January

25, 1931, leaving appellant, her surviving husband, and one daughter, On March 19, 1931, appellant was appointed administrator of her estate. On January 28, 1932 this bill was filed. The decree herein found that appellee sold to Dora M. Lager this Coon-Rapids property for \$3100.00, for which Dora M. Lager agreed to pay appellee therefor when she was able. In our opinion there was no competent evidence in the record to sustain this finding and furthermore neither the heirs or legal representative of the estate of Dora M. Lager were parties to this proceeding. Appellant, in his pleadings, insists that the \$1500.00 represented by a certificate of deposit issued by the Farmers National Bank on September 21, 1932 in the name of appellee is held by him as administrator of the estate of his deceased wife, and therefore it was improper for the decree to direct him to turn this certificate over to the Clerk of the court for the use of appellee, inasmuch as administrator he is not a party to this suit. The evidence, however, discloses that on January 22, 1931 there were several certificates of deposit outstanding other than those hereinbefore referred to, which were payable to appellee and which aggregated \$1271.36. The evidence further discloses that these represented the proceeds derived from the sale of one of the Coon-Rapids properties: that on September 21, 1932, which was eight months after the death of appellant's wife, he, appellant surrendered these certificates to the bank, added \$157.38 thereto and with the amount due for accrued interest procured the issuance by the bank of a certificate of deposit for \$1500.00, payable to appellee, and it is this certificate which the decree ordered delivered to the clerk for the use of appellee.

Appellant testified on his direct examination, when called as a witness for appellee, that both appellee and his wife had told

5, 1931, leaving appellant, her surviving husband, and one daughter, -
- on March 19, 1931, appellant was appointed administrator of her es-
- tate. On January 28, 1932 this bill was filed. The George House
- found that appellant sold to one M. Leger this Cook-Lepida property
- for \$125.00, for which one M. Leger agreed to pay appellant \$125.00 in
- cash and was able. In our opinion there was no competent evidence in
- the record to sustain this finding and furthermore neither the heirs
- nor legal representative of the estate of one M. Leger were parties to
- this proceeding. Appellant, in her pleading, states that the
- \$125.00 represented by a certificate of deposit issued by the Farmers
- National Bank on September 21, 1932 in the name of appellant is held
- by her as administrator of the estate of her deceased wife, and there-
- fore it was improper for the decree to direct her to turn this certi-
- ficate over to the clerk of the court for the use of appellant, her
- husband as administrator in his wife's bill. The appellant,
- husband, declares that on January 19, 1931 he was served with notice
- limited to a certain amount of money and that he was not present at the
- trial, which were payable to appellant and which represented \$25.00.
- The evidence further discloses that these payments were made to the
- appellant from the sale of one of the Cook-Lepida properties; that on
- September 21, 1932, which was eight months after the death of ap-
- pellant's wife, he, appellant transferred these certificates to the
- bank, added \$125.38 thereto and with the amount due for accrued in-
- terest procured the issuance by the bank of a certificate of deposit
- for \$125.00, payable to appellant, and it is this certificate which
- the parties contend is the subject of this bill.
- Appellant testified to and directed examination, then called
- as a witness for appellant, that both appellant and his wife had sold

him that appellee gave one of these houses to his wife and that the \$1500.00 derived from the sale of the other dwelling belonged to appellee and that she was entitled to that sum whenever she wanted the money. He further testified that his wife left this \$1500.00 in his hands to make that payment whenever appellee needed it.

In our opinion the institution of this suit was a demand on the part of appellee for this money and there was no error in directing appellant to turn this certificate over to the clerk of the court for the use of appellee.

The decree of the lower court will be reversed and this cause is remanded to the Circuit Court of Henry County, with directions to enter a decree in conformity with this opinion. Each party will pay one-half of the costs in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

him that appellee gave one of these houses to his wife and that the

\$1000.00 derived from the sale of the other dwelling belonged to
appellee and that she was entitled to that sum whenever she wanted
the money. He further testified that his wife left him \$1000.00
in the hands of some third person whenever appellee needed it.

In our opinion the institution of this suit was a fraud
on the part of appellee for this money and there was no error in
directing appellant to turn this certificate over to the clerk of
the court for the use of appellee.

The decree of the lower court will be reversed and this
cause is remanded to the circuit court of Henry County, with
instructions to enter a decree in conformity with this opinion.
The party will pay one-half of the costs in this court.

REVEREND JUSTICE OF THE SUPREME COURT

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

47
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 647³

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 14 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1934.

William A. Atkinson,

Appellee,

vs.

Julia P. Warren,

Appellant.

Appeal from the Circuit Court
of Winnebago County.

DOVE, J.

The Circuit Court of Winnebago County overruled a general and special demurrer to the amended declaration of the plaintiff below, and the defendant below elected to stand by her demurrer, refused to plead further and from a judgment rendered against her in the sum of \$2204.63 brings the record to this court for review by appeal.

The declaration as amended alleges that the plaintiff and the defendant, with Moses Allen Warren and the Security Trust Company, a Michigan corporation, acting as administrators with the will annexed of Louise W. Atkinson, deceased, in February, 1925, executed the following written contract, viz: "Memorandum of Agreement made this day of February, A.D. 1925, by Julia P. Warren, of Rockford, Illinois, Moses Allen Warren of New York City, New York, William A. Atkinson, of Detroit, Michigan, and the Security Trust Company, a Michigan Corporation, acting as administrator with will annexed of Louise W. Atkinson, Deceased. Witnesseth: That, whereas, Julia P. Warren is the mother of Louise W. Atkinson, Deceased, and of the said Moses Allen Warren, and Whereas, the said Julia P. Warren is the owner of and possessed of loans and mortgages kept, used and managed by her in several different accounts according to a plan of her own with a view to final disposition of the same to her said children and others and has according to said plan

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DIVISION
JANUARY TERM, 1935

William A. Atkinson,

Appellant,

vs.

Lula P. Warren,

Appellee.

DOVE, 1.

The Circuit Court of Winnebago County overruled a general and special demurrer to the amended declaration of the plaintiff below, and the defendant below elected to stand by her demurrer, refused to plead further and from a judgment rendered against her in the sum of \$2304.82 brings the record to this court for review by appeal.

The declaration as amended alleges that the plaintiff and the defendant, with Moses Allen Warren and the Security Trust Company, a Michigan corporation, acting as administrators with the will annexed of Louis W. Atkinson, deceased, in February, 1935, executed the following written contract, viz: "Memorandum of Agreement made this . . . day of February, A.D. 1935, by Lula P. Warren, of Rockford, Illinois, Moses Allen Warren of New York City, New York, William A. Atkinson, of Detroit, Michigan, and the Security Trust Company, a Michigan Corporation, acting as administrators with will annexed of Louis W. Atkinson, deceased. Witnesseth: That, whereas, Lula P. Warren is the mother of Louis W. Atkinson, deceased, and of the said Moses Allen Warren, and whereas, the said Lula P. Warren is the owner of and possessed of loans and mortgages kept, used and managed by her in several different accounts according to a plan of her own with a view to final disposition of the same to her said children and others and has according to said plan

and for many years last past, taken some notes, mortgages and other securities in the name of the said Louise W. Atkinson and has at times and when necessary, called upon the said Louise Warren Atkinson to make, execute and deliver sufficient and proper releases, assignments, etc. but has at all times, retained sole possession of all of said notes, mortgages and securities and has never parted with the ownership thereof and has never delivered the same or any part thereof, to the said Louise Warren Atkinson but has from time to time given to the said Louise Warren Atkinson, a portion of the income thereof, and Whereas, the said Louise W. Atkinson departed this life the fifth day of June, A.D. 1934, in the City of Detroit, State of Michigan, leaving a last will and testament which has been admitted to probate in the Probate Court for the County of Wayne and State of Michigan, and Whereas, on the petition of the said William A. Atkinson the said Security Trust Company, of Detroit, Michigan, has been duly appointed and is now acting as administrator of said estate with will annexed, and Whereas, the said William A. Atkinson is the surviving husband of the said Louise W. Atkinson, Deceased, and Whereas, the second paragraph of the said last will and testament is as follows, to-wit: 'All funds invested in western mortgages of which I am possessed at the time of my decease, and all property which has been in the care of my mother, Julia P. Warren, of Rockford, Illinois, I give and bequeath to her, should she survive me, with the understanding that she forward to my husband, William A. Atkinson, of Detroit, Michigan, the sum of \$750.00 quarterly, or an annual income of \$3000.00, as he may desire during his lifetime, so long as he shall remain unmarried', and Whereas, the said last will and testament was made by the said Louise W. Atkinson in view of her expectancy of estate from her said mother, and Whereas, the property referred to in said paragraph 2 in said will had not passed to the said Louise W. Atkinson and is not, thereby, and therefore does not become an

and for many years last past, called upon her, for her and
other necessities in the name of the said Louise W. Atkinson and
has at times and when necessary, called upon the said Louise
Watson Atkinson to make, execute and deliver sufficient and
proper release, assignments, etc. but has at all times, retained
sole possession of all of said notes, mortgages and securities and
has never parted with the ownership thereof and has never delivered
the same or any part thereof, to the said Louise Watson Atkinson
but has from time to time given to the said Louise Watson Atkinson,
a portion of the income thereof, and whereas, the said Louise W.
Atkinson departed this life the fifth day of June, A.D. 1934, in
the City of Detroit, State of Michigan, leaving a last will and
testament which has been admitted to probate in the Probate Court
for the County of Wayne and State of Michigan, and whereas, on the
petition of the said William A. Atkinson the said Security Trust
Company, of Detroit, Michigan, has been duly appointed and is now
acting as administrator of said estate with annexed, and
whereas, the said William A. Atkinson is the surviving husband
of the said Louise W. Atkinson, deceased, and whereas, the second
paragraph of the said last will and testament is as follows, to-wit:
'All funds invested in western mortgages of which I am possessor
at the time of my decease, and all property which has been in the
care of my mother, Julia E. Warren, of Rockford, Illinois, I give
and bequeath to her, should she survive me, with the understanding
that she forward to my husband, William A. Atkinson, of Detroit,
Michigan, the sum of \$750.00 quarterly, or an annual income of
\$3000.00, as he may desire during his lifetime, so long as he shall
remain unmarried', and whereas, the said last will and testament
was made by the said Louise W. Atkinson in view of her expectancy
of estate from her said mother, and whereas, the property referred
to in said paragraph 2 is said will and bequeathed to the said Louise
W. Atkinson and is not, thereby, and therefore does not become an

asset of said estate, and as to said section said will of necessity becomes inoperative, and Whereas, it is the desire of all parties to this contract that the legal status of the parties hereto each in relation to the other shall be established, understood and confirmed, and for the further purpose of avdding any possible misunderstanding, dispute or litigation pertaining thereto, and further it being the wish and desire of the said Julia P. Warren to carry out the wishes and intent of her said daughter pertaining to the payment of annuity as provided for in and by said paragraph of said will, and further the said Julia P. Warren desiring to have proper releases of record made in connection with said mortgages, notes, bonds and securities so held by her in the name of the said Louise W. Atkinson and as they shall be demanded and requested from time to time by such persons who shall be entitled thereto to the end that the said Julia P. Warren may continue to handle, negotiate, dispose of, collect, receipt for, assign and properly transfer such notes, bonds, mortgages and securities so standing in the name of the said Louise W. Atkinson at the time of her death and to make proper release of mortgages in some instances which have been paid prior to the death of the said Louise W. Atkinson but which through inadvertence have not been released, and in consideration of the premises and of the covenants and agreements herein made, it is therefore agreed First: The said Julia P. Warren hereby agrees to carry out the provisions of Paragraph 2 of said last will and testament pertaining to the payment of annuity to the said William A. Atkinson and to that end she hereby binds herself, her heirs, executors, administrators and assigns. Second: The said Moses Allen Warren hereby agrees to carry out any instructions or directions given by will or otherwise by the said Julia P. Warren pertaining to the payment of said annuity as provided in and by said paragraph 2 of said last will and testament. Third: The said William A. Atkinson agrees to accept the payment of annuity as herein provided in full of all claims, directly or indirectly, against the said Julia P. Warren or against her estate or for any notes, bonds, mortgages or other securities whatsoever which have been or now are in the

of said estate, and as to said estate said will of
necessarily becomes imperative, and whereas, it is the desire
of all parties to this contract that the legal status of the
parties hereto each in relation to the other shall be established,
understood and confirmed, and for the further purpose of avoiding
any possible misunderstanding, dispute or litigation pertaining
thereto, and further it being the wish and desire of the said
Julia P. Warren to carry out the wishes and intent of her said
husband pertaining to the payment of annuity as provided for
in and by said paragraph of said will, and further the said
Julia P. Warren desiring to have proper releases of record made
in connection with said mortgages, notes, bonds, or securities
so held by her in the name of the said Louise W. Atkinson and
as they shall be demanded and requested from time to time by
such persons who shall be entitled thereto to the end that
the said Julia P. Warren may continue to handle, negotiate,
dispose of, collect, receipt for, assign and properly transfer
such notes, bonds, mortgages and securities so standing in the
name of the said Louise W. Atkinson at the time of her death and
to make proper releases of mortgages in some instances which have
been paid prior to the death of the said Louise W. Atkinson but
which through inadvertence have not been released, and in con-
sideration of the premises and of the covenants and agreements
herein made, it is therefore agreed first: The said Julia P.
Warren hereby agrees to carry out the provisions of paragraph
3 of said last will and testament pertaining to the payment of
annuity to the said William A. Atkinson and to that end she
hereby binds herself, her heirs, executors, administrators and
assigns. Second: The said Louise Allen Warren hereby agrees to
carry out any instructions or directions given by will or other-
wise by the said Julia P. Warren pertaining to the payment of
said annuity as provided in and by said paragraph 3 of said last
will and testament. Third: The said William A. Atkinson agrees
to accept the payment of annuity as herein provided in full of
all claims, directly or indirectly, against the said Julia P.
Warren or against her estate or for her notes, bonds, mortgages
or other securities whatsoever which have been or now are in the

possession of the said Julia P. Warren whether in the name of Louise W. Atkinson or otherwise; that he will save and keep harmless the said Julia P. Warren, her heirs, executors, administrators and assigns from any claims or effort on the part of any representative of the estate of Louis W. Atkinson, and it is further understood that the provisions and undertakings embodied in this contract to be kept and performed upon the part of the Security Trust Company as such administrator as hereinafter set forth, are and shall become his obligation so far as he shall be able to carry the same into effect or cause the same to be done, and he hereby further waives all alleged right or claim to have such administrator or any successor to attempt by litigation or otherwise the recovery of any such notes, bonds, mortgages or other securities or other thing of value from the said Julia P. Warren, or from her heirs, executors, administrators or assigns and if he shall ever be called upon so to do, he shall join in the execution or delivery of any of the releases, conveyances, documents, endorsements or assignments as is herein provided to be made by the said Security Trust Company as is hereinafter provided, and to the end that this contract may be carried out particularly as to such releases, assignments, etc., hereby authorizes, empowers and directs the said administrators of the estate of Louise W. Atkinson or any successor thereof or any possible trustee, to make, execute and deliver all sufficient and proper endorsements, assignments, acquittances, releases, deeds and disclaimers for the purpose of properly releasing and discharging securities of record, cancellation of notes or other obligations or ~~of~~ for the purpose of Correcting titles in connection with any mortgages that now stand in the name of the said Louise W. Atkinson or for the purpose of conveying legal title to the same or any part thereof in the said Julia P. Warren or her heirs, executors, administrators or assigns whenever the same shall be requested by those entitled thereto. Fourth: The said Security

provision of the said Louis F. Warren Trust in the case of Louis F. Warren or otherwise; and he will have and take likewise the said Louis F. Warren, her heirs, executors, administrators and assigns from any claim or effort on the part of any representative of the estate of Louis W. Atkinson, and it is further understood that the provisions and undertakings included in this contract to be kept and performed from the part of the Security Trust Company as such administrator as hereinafter set forth, and shall become his obligation so far as he shall be able to carry the same into effect or cause the same to be done, and he hereby further waives all alleged right or claim to have such administrator or any successor or attempt of litigation on otherwise the recovery of any such notes, bonds, mortgages or other securities or other thing of value from the said Louis F. Warren, or from her heirs, executors, administrators or assigns and if he shall ever be called upon so to do, he shall in the execution or delivery of any of his releases, assignments, documents, endorsements or assignments as is herein provided to be made by the said Security Trust Company as its hereinafter provided, and to the end that this contract may be carried out particularly as to such releases, assignments, etc., hereby authorized, empowers and directs the said administrators of the estate of Louis W. Atkinson or any successor thereof or any possible trustee, to make, execute and deliver all sufficient and proper releases, assignments, endorsements, etc., and disclaimers for the purpose of properly releasing and discharging and securities of record, cancellation of notes or other obligations or to for the purpose of carrying out the same in connection with any mortgages that now stand in the name of the said Louis W. Atkinson or for the purpose of conveying legal title to the same or any part thereof in the said Louis F. Warren or her heirs, executors, administrators or assigns whenever the same shall be requested by those entitled thereto. Fourth: The said Security

Trust Company as such administrator hereby agrees to make, execute and deliver sufficient legal and proper endorsements, assignments, acquittances, releases, deeds, conveyances and disclaimers or other papers necessary to recover, discharge, assign, transfer or convey written evidences of obligations of indebtedness standing in the name of the said Louise W. Atkinson, deceased, and belonging to the said fund so owned, possessed and controlled by the said Julia P. Warren and to make necessary and proper endorsements of any note or obligation pertaining thereto the same to be without recourse or liability and without expense on its part or without expense to the estate of the said Louise W. Atkinson, deceased, such execution, endorsements and deliveries as aforesaid to be made whenever the same shall be requested by the said Julia P. Warren, her lawful authorized agents or attorneys or her heirs, executors, administrators or assigns; that it will not demand of, sue for, or attempt to recover any of such papers or securities or to collect any proceeds thereof and the said Julia P. Warren, her heirs, executors, administrators and assigns hereby agree to save and keep harmless the said Security Trust Company from all personal liability or obligation by reason thereof and shall pay the necessary fees for notaries and scribes in connection therewith."

The declaration then avers that the plaintiff has not remarried since the death of his former wife, Louise W. Atkinson, but has remained unmarried: "that prior to and at the time of the death of the said Louise W. Atkinson and continuously thereafter until the contract hereinbefore set forth was made and executed, the said defendant, Julia P. Warren, held in her possession for the said Louise W. Atkinson a considerable number of farm loans secured by mortgages upon real estate, which mortgages and loans were issued to and stood in the name of the said Louise W. Atkinson, and which aggregated a large sum of money, the exact amount of which is to this plaintiff unknown,

Trust Company as such administrator hereby agrees to make, execute, and deliver sufficient legal and proper assignments, releases, receipts, conveyances and discharges or other papers necessary to recover, discharge, assign, transfer or convey written evidence of obligations of indebtedness standing in the name of the said Louise W. Atkinson, deceased, and belonging to the said fund so owned, possessed and controlled by the said Julia P.

Warren and to make necessary and proper endorsements of any note or obligation pertaining thereto the same to be without recourse or liability and without expense on its part or without expense to the estate of the said Louise W. Atkinson, deceased, such execution, endorsements and deliveries as aforesaid to be made whenever the same shall be requested by the said Julia P. Warren, her lawful

or assigns; that it will not demand of, sue for, or attempt to recover any of such papers or securities or to collect any proceeds thereof and the said Julia P. Warren, her heirs, executors, administrators and assigns hereby agree to save and keep harmless the said Security Trust Company from all personal liability or obligation by reason thereof and shall pay the necessary fees for notaries and

The declaration then avers that the plaintiff has not remarried since the death of his former wife, Louise W. Atkinson, and has remained unmarried; "that prior to and at the time of the death of the said Louise W. Atkinson and continuously thereafter until the contract heretofore set forth was made and executed, the said defendant, Julia P. Warren, held in her possession for the said Louise W. Atkinson a considerable number of farm loans secured by mortgages upon real estate, which mortgages and loans were issued to and stood in the name of the said Louise W. Atkinson, and which were secured by

but he believes and on belief here states the fact to be that such farm mortgages and loans amounted to at least \$40,000.00 or \$50,000.00; that prior to and at the time of the death of the said Louise W. Atkinson, she, the said Louise W. Atkinson, held the legal title to said mortgages and loans, and that she, the said Louise W. Atkinson, believed and claimed that said mortgages and loans belonged to her and that her mother was merely holding possession of them for her; that after the death of the said Louise W. Atkinson and the appointment of the said Security Trust Company as administrator of her estate with the will annexed, the plaintiff herein and the said Security Trust Company as such administrator believed and in good faith claimed that said mortgages and loans formed a part of the estate of the said Louise W. Atkinson, deceased; that said Security Trust Company, after its appointment as such administrator and shortly prior to the making of the contract hereinbefore set forth, planned and was about to institute and prosecute action against the said Julia P. Warren for the recovery of said securities as a part of the estate of the said Louise W. Atkinson, deceased, of all of which matters and facts the said Julia P. Warren, had full knowledge and notice."

The declaration further averred "that immediately upon the making of said contract, the parties thereto entered upon the performance thereof; that the plaintiff and the Security Trust Company, a Michigan corporation, acting as administrator with will annexed of Louise W. Atkinson, deceased, have and each of them has fully and completely complied with and performed all of the terms and provisions of said contract which, by the terms thereof, they or either of them were required to comply with and perform; that the defendant Julia P. Warren, is still living; that in accordance with the terms and provisions of said contract, the defendant, Julia P. Warren, became and was obligated to pay to the plaintiff, William A. Atkinson, the sum of \$750.00 quarterly, or at the end of each and every three months; that the said defendant, Julia P. Warren, did from the time

but he believed and on belief has stated the fact to be that the said
said mortgage and loan was made to the said Louis W.
that prior to and at the time of the date of the said Louis W.
Atkinson, she, the said Louis W. Atkinson, with the legal title
to said mortgage and loan, and that she, the said Louis W.
Atkinson, believed and claimed that said mortgage and loan be-
longed to her and that her father was merely holding possession of
them for her; that after the death of the said Louis W. Atkinson
and the appointment of the said Security Trust Company as adminis-
trator of her estate with the will annexed, the plaintiff herein and the
said Security Trust Company as such administration believed and in
good faith claimed that said mortgage and loan formed a part of
the estate of the said Louis W. Atkinson, deceased; that said
Security Trust Company, after the appointment as such administrator
and shortly prior to the making of the contract aforesaid set
forth, planned and was about to institute and prosecute action
against the said Julia P. Warren for the recovery of said securities
as a part of the estate of the said Louis W. Atkinson, deceased,
of all of which matters and facts the said Julia P. Warren, had
full knowledge and belief.

The declaration further averred that immediately upon the
making of said contract, the parties thereto entered upon the per-
formance thereof; that the plaintiff and the Security Trust Company,
a Michigan corporation, acting as administrator with will annexed of
the said Louis W. Atkinson, deceased, have and each of them has fully and
completely complied with and performed all of the terms and provi-
sions of said contract which, by the terms thereof, they or either
of them were required to comply with and perform; that the defendant
Julia P. Warren, is still living; that in accordance with the terms
and provisions of said contract, the defendant, Julia P. Warren, be-
came and was obligated to pay to the plaintiff, William A. Atkinson,
the sum of \$750.00 quarterly, or at the end of each and every three
months; that the said defendant, Julia P. Warren, did from the time

of the execution of said contract until the quarterly payment which fell due December 5, 1931, pay to the said plaintiff, William A. Atkinson, all of said quarterly payments; that prior to the commencement of this suit there became due and payable according to the terms and provisions of said contract from the said defendant to the said plaintiff a quarterly payment of \$750.00 on December 5, 1931, a quarterly payment of \$750.00 on March 5, 1932, and a quarterly payment of \$750.00 on June 5, 1932, making a total of \$2250.00; that neither the defendant, nor any one for her, has paid any part or portion of said three quarterly payments aggregating \$2250.00, except only the sum of \$250.00, which was paid by the said defendant to the plaintiff on January 11, 1932, leaving a balance unpaid of \$2000.00 at the time this suit was instituted; that in accordance with the terms and provisions of said contract and prior to the commencement of this suit, the defendant, Julia P. Warren, became and was liable to pay to the defendant the said principal sum of \$2,000.00, and is further liable to pay to the plaintiff interest at the lawful rate of 5% on each of said quarterly payments from the date the same became due, until paid." The declaration concludes in the usual form, alleging a failure of the defendant to pay to the plaintiff the sum due him or any part thereof, and lays the damages which plaintiff has sustained at \$3,000.00.

It is the contention of appellant that the averments of this declaration disclose that appellee never had any right to have paid to him an annuity of \$3,000.00 or any part thereof, that appellee's promise to give releases was an agreement to do what the estate of Louise W. Atkinson was bound to do and therefore no consideration passed from appellee to appellant to support appellant's promise to pay this annuity as appellee's promises were of no real value or benefit to appellant.

On behalf of appellee it is insisted that the averments of the declaration disclose a sufficient legal consideration passing from

of the execution of said contract until a certain day in 1931, which day was December 31, 1931, say to the said Plaintiff, William A. Atkinson, all or part quarterly payments; and prior to the execution of this said contract the said Plaintiff was indebted to the said defendant on said contract for the sum of \$250.00 on January 1, 1931, a quarterly payment of \$75.00 on March 1, 1931, and a quarterly payment of \$75.00 on May 1, 1931, making a total of \$225.00; and that neither the defendant, nor any one for him, has paid any part or portion of said total quarterly payments as aforesaid; and that only the sum of \$250.00, which was paid by the said defendant to the Plaintiff on January 1, 1931, leaving a balance unpaid of \$225.00 at the time this suit was instituted; that in accordance with the terms and provisions of said contract and prior to the execution of this suit, the defendant, William A. Atkinson, became and was liable to pay to the plaintiff the said principal sum of \$250.00, and is further liable to pay to the plaintiff interest at the lawful rate of 6% on each of said quarterly payments from the date the same became due, until paid. The defendant executed in the usual form, obligating a failure of the defendant to pay to the plaintiff the sum and him or any part thereof, and also the damages which plaintiff has sustained at \$2,000.00.

It is the contention of appellant that the averments of this declaration disclose that appellee never had any right to have paid to him an amount of \$2,000.00 or any part thereof, that appellee's promise to give release was an agreement to do what the estate of Louise W. Atkinson was bound to do and therefore no consideration passed from appellee to appellant in exchange for the promise to give release as appellee's promise was of no real value or benefit to appellant.

On behalf of appellee it is insisted that the averments of the declaration disclose a contract which was binding on the defendant from

appellee to sustain appellant's promise to pay the annuity as the agreement which forms the basis of this action was a family settlement contract which the courts favor.

Among other things, the declaration charged and the demurrer admitted that in February 1925 appellant, her son Moses Allen Warren, appellee and the administrator with the will annexed of Louise W. Atkinson, deceased, executed a written instrument which recited that the reason for its execution was the desire of the parties thereto to have the legal status of the parties each in relation to the other established, understood and confirmed and for the further purpose of avoiding any possible misunderstanding, dispute or litigation pertaining thereto; that it was the desire of appellant to pay appellee the annuity provided in her daughter's will and her desire also to procure releases of mortgages which she owned, but which had been taken in the name of her deceased daughter: that appellee is the surviving husband of Louise W. Atkinson and that prior to her death, her mother, appellant herein, had a considerable sum of money invested, the amounts thereof being evidenced by notes, mortgages and securities taken in the name of her daughter Louise W. Atkinson: that when called upon to do so, Louise would execute proper releases or assignments thereof, but that at all times appellant retained possession of the evidences of such indebtedness and never parted with the ownership thereof, although appellant did at various times give her daughter a portion of the income therefrom: that Louise died testate on June 5th, 1924: that the second paragraph of her will bequeathed to her mother certain property, with the understanding that her mother pay appellee an annuity of \$3,000.00 so long as he shall remain unmarried: that Louise did not own the property which she sought to dispose of in the second paragraph of her will and said paragraph therefore became inoperative: that appellant nevertheless desired to carry out the wishes of her daughter and obligated herself to pay appellee \$3,000.00 per year as long as he should remain unmarried. In consideration of this promise, appellee agreed to accept said sum in

appellee to execute appellant's promise to pay her annuity as the
a document which forms the basis of this action was a family settle-
ment contract which the court favor.

Among other things, the declaration charged and the counter-
admitted that in February 1935 appellant, then known as Alice Warren,
appellee and the administrator with the will annexed of Louise W.
Atkinson, deceased, executed a written instrument which recited that
the reason for the execution was the desire of the parties hereto to
have the legal status of the parties each in relation to the other
established, understood and confirmed and for the further purpose of
avoiding any possible misunderstanding, dispute or litigation per-
taining thereto; that it was the desire of appellee to pay appellee
the annuity provided in her daughter's will and her desire also to
procure release of mortgages which she owned, but which had been
taken in the name of her deceased daughter; that appellee in the
surviving husband of Louise W. Atkinson and was prior to her death,
her mother, appellant herself, had a considerable sum of money in-
vested, the amounts thereof being evidentially stated, mortgages and
securities taken in the name of her daughter Louise W. Atkinson;
that when called upon to do so, Louise would execute proper releases
or assignments thereof, but that at all times appellant retained
possession of the evidences of such indebtedness and never parted with
the ownership thereof, although appellant did at various times give
her daughter a portion of the income therefrom; that Louise died
testate on June 5th, 1934; that the second paragraph of her will be-
queathed to her mother certain property, with the understanding that
her mother pay appellee an annuity of \$5,000.00 so long as he shall
remain unmarried; that Louise did not own the property which she sought
to dispose of in the second paragraph of her will and said paragraph
thereof being invalid; that appellee retained possession of the
property and the income of her daughter and obligated herself to pay
appellee \$5,000.00 per year as long as he should remain unmarried. It
would execution of this promise, appellee agreed to accept said sum in

full of all claims against appellant or her estate and agreed that he would save and keep appellant and her estate harmless from any claims, or effort on the part of the representative of the estate of his deceased wife to assert a claim against her or her estate and he himself waived any right to have the representative of his wife's estate, attempt to recover from appellant or her estate anything of value; that if ever called upon to do so, he would join in the execution or delivery of any of the releases, conveyances, endorsements or documents as the agreement provides shall be executed by the representative of his wife's estate, and by the instrument he expressly directs said representative to execute to those entitled thereto, whenever requested, such instruments in connection with any mortgages that stand in the name of Louise W. Atkinson.

From the foregoing, it is apparent that when this agreement was executed in February, 1925, following the death of appellant's daughter in June, 1924, nothing of value passed from appellee to support appellant's promise to pay this annuity. Appellee recognized that appellant took nothing by the will of his deceased wife, as the bequest to appellant by her daughter was made because Louise expected to receive an estate from her mother, but this expectation was not fulfilled and the property which she bequeathed her mother never became an asset of Louise's estate and therefore the provision for her mother became inoperative. Appellee insists, however, that the legal title to the notes and mortgages was never vested in appellant, as Louise was the payee in the several notes and the mortgagee in the several mortgages and therefore she became vested with the legal title in her lifetime and upon her death, by operation of law, title thereto became vested in her administrator with the will annexed. This may be true, but in February, 1925, over his own signature, appellee recognized that these notes and mortgages were not assets of his wife's estate. By that agreement he never claimed they were. He conceded they belonged to appellant and only obligated himself to join in the execution or delivery of any releases or documents which the agreement

will of all other parties to the estate and agreed that
he would have and keep possession and control of the estate
claim, or effort on the part of the representative of the estate
of his deceased wife to assert a claim against her on her estate
and he himself waived any right to have the representative of his
wife's estate, attempt to recover from appellant on her estate any-
thing of value; that it was called upon to do so, he would join in
the execution or delivery of any of the releases, conveyances,
endorsements or documents as the agreement provides and all be executed
by the representative of his wife's estate, and as the instrument be
expressly directed and representative to execute to those entitled
thereto, whenever requested, such instruments in connection with any
mortgages that stand in the name of Louise W. Atkinson.
From the foregoing, it is apparent that from this agreement
was executed in February, 1935, following the death of appellant's
daughter in June, 1934, nothing of value passed from appellee to
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that appellant took nothing by the will of his deceased wife, as the
bequest to appellant by her daughter was made because Louise expected
to receive an estate from her mother, but this expectation was not
fulfilled and the property which she bequeathed her mother never be-
came an asset of Louise's estate and therefore the provision for her
mother became inoperative. Appellee insists, however, that the legal
title to the notes and mortgages was never vested in appellant, as
Louise was the payee in the several notes and the mortgages in the
several mortgages and therefore she became vested with the legal title
in her lifetime and upon her death, by operation of law, title thereto
became vested in her administrator with the will annexed. This may
be true, but in February, 1935, over his own signature, appellee
represented that these notes and mortgages were not assets of his wife's
estate. It was necessary to have stated that the

provides shall be executed by the representative of his wife's estate. At the time this agreement was made, our statute, (Cahill Ill. Rev. Stat. Chap. 95, Sec. 11), provided that any party aggrieved could recover a penalty against a mortgagee or his administrator who should, knowing that the debt secured by the mortgage had been paid, refuse to release the same of record.

Appellee, however, calls our attention to the further allegations of the amended declaration which allege that prior to the time of the death of Louise W. Atkinson, she believed and claimed that said mortgage loans belonged to her and that her mother was merely holding possession of them for her and that after her death, appellee and the administrator of her estate believed and in good faith claimed that said mortgages and loans formed a part of her estate and that said administrator shortly prior to the execution of the contract in February, 1925 planned and was about to institute and prosecute an action against appellant for the recovery of said securities as a part of the estate of said Louise W. Atkinson, and insists that under the authorities this agreement was a family settlement contract and that its provisions terminated an honest controversy between members of a family and that such a termination is in itself a sufficient consideration to support the promises contained in the agreement. The case of Woodall v. Peden, 274 Ill. 301 is cited and relied upon as sustaining this contention. It is said in that case that a compromise of a doubtful right is sufficient consideration for a conveyance, but that if a party knows or ought to know that a claim which is compromised has no foundation whatever and cannot be enforced upon any state of proof, either in law or equity, it furnishes no consideration for a conveyance of land and there is nothing in the nature of a compromise where the claim made is one which could not be enforced under any state of proof. In 12 C.J., 316, it is stated that conflicting claims are essential to the validity of a compromise. At the time this agreement was made if there were honest controversies between members of this family,

provides shall be executed by the representative of the estate
thereof. At the time this agreement was made, the estate
(Cecil III, Rev. 1935, Sec. 11), provided that any
party aggrieved could receive a remedy against the mortgage
on his administration as a whole, knowing that the debt secured
by the mortgage had been paid, where to release the same of record.
Appellee, however, while not attention to the latter allega-
tions of the amended declaration which allege that under the
terms of the deed of gift to appellee, the mortgage was
that said mortgage loan belonged to her and that her husband was
merely holding possession of same for her and that after her death,
appellee and the administrator of her estate believed and in good
faith claimed that said mortgage and loan formed a part of her
estate and that said administrator shortly prior to the execution
of the contract in January, 1935 planned and was about to institute
and prosecute an action against appellee for the recovery of said
amounts as a part of the estate of said Louise V. Robinson, and
alleges that under the authorities this agreement was a family
settlement contract and that its provisions constituted a bona fide
controversy between members of a family and that such a termination
is in itself a sufficient consideration to support the process con-
tained in the agreement. The case of Woodhill v. Pagan, 274 Ill. 301
is cited and relied upon as sustaining this contention. It is said
in that case that a conveyance of a doubtful right is sufficient
consideration for a conveyance, but that it is a party knows or ought
to know that a claim which is compromised has no foundation whatever
and cannot be enforced upon any state of proof, either in law or
equity, it furnishes no consideration for a conveyance of land and
there is nothing in the nature of a compromise where the claim made
is one which could not be enforced under any state of proof. In 13
C.C. 318, it is stated that conflicting claims are essential to
the validity of a compromise. At the time this agreement was made
if there were honest controversies between members of this family,

the contract itself does not disclose what they were, and it is this contract which forms the basis of this action. It recited that the securities therein mentioned had always belonged to appellant and appellee knew it. For him now to be permitted to insist that he, at that time believed, and in good faith claimed, that these securities formed a part of his wife's estate and that prior to the time of his wife's death she believed and claimed that these securities belonged to her would be to permit him to assume an inconsistent position and such averments are repugnant to and contradictory of the provisions of the contract itself.

In our opinion the trial court erred in overruling the demurrer to the amended declaration and the judgment is therefore reversed and the cause remanded with directions to sustain the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

the witness itself does not disclose what they were, and it is
this contract which forms the basis of this action. It is noted
that the securities therein mentioned had always belonged to
applicant and applicant's wife. But his wife is not entitled to
include them as part of her estate, and in good faith claimed,
that these securities formed a part of his wife's estate and that
prior to the time of his death she delivered and claimed that
these securities belonged to her would be to permit him to assume
to incorporate property and such securities as belonged to and
ownership of the securities therein.
In our opinion the trial court erred in overruling the
objection to the amended declaration and the judgment is therefore
reversed and the cause remanded with directions to sustain the
demurrer.

REVEREND AND HONORABLE JUSTICE

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8848

7617

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 647⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 22 1935 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1935.

| | | |
|----------------|---|-------------------------|
| A. FUSATERE, |) | |
| |) | |
| Appellant, |) | |
| |) | APPEAL FROM THE CIRCUIT |
| vs. |) | |
| |) | COURT OF WARREN COUNTY. |
| H. D. DARNELL, |) | |
| |) | |
| Appellee. |) | |

DOVE, J.

On August 31st, 1929, the parties hereto entered into a written lease by the provisions of which appellant leased certain business property in the City of Monmouth to appellee for a period of five years from August 31, 1929 at a stipulated monthly rental of \$175.00 per month, payable in advance. On June 3, 1933 by virtue of a power of attorney therein, a judgment by confession was rendered by the Circuit Court of Warren County in favor of appellant and against appellee for \$1267.25, which included the sum of \$250.00 attorney fees. Subsequently this judgment was opened up and leave granted appellee to plead. Pleas were filed, a trial had before a jury which returned a verdict in favor of appellee, upon which judgment was rendered and the record is before this court for review by appeal.

IN THE
APPELLATE COURT OF MISSISSIPPI

January 27, 1933.

APPEAL FROM THE CIRCUIT
COURT OF WARREN COUNTY.

A. PUGATEND,
Appellant,
vs.
H. D. BARNWELL,
Appellee.

DOVE, J.

On August 21st, 1922, the parties hereto entered into a written lease by the provisions of which appellant leased certain business property in the City of Natchez to appellee for a period of five years from August 21, 1922 at a stipulated monthly rental of \$175.00 per month, payable in advance. On June 8, 1923 by virtue of a power of attorney therein, a judgment by confession was rendered by the Circuit Court of Warren County in favor of appellant and against appellee for \$285.25, which included the sum of \$280.00 attorney fees. Subsequently this judgment was opened up and leave granted appellee to plead. Pleadings were filed, a trial had before a jury which returned a verdict in favor of appellee, upon which judgment was rendered and the same is before this court for review.

BY APPEAL.

According to the bill of particulars filed by appellant on January 12, 1934, his claim is for rent of the premises for the twelve month period beginning July 1, 1932 and ending June 30, 1933 at \$175.00 per month, aggregating \$2100.00, less a cash credit of \$592.25 and a further credit of \$25.00 for a cow, leaving a balance of \$1482.75 due him, exclusive of attorney fees. His testimony on direct examination was that appellee paid \$175.00 per month until July 1, 1932 and then \$150.00 for a while, and later at various times paid \$75.00, which appellant accepted on account.

According to the testimony of appellee, he and appellant had a conversation in the early part of July 1932, in which appellee stated to appellant that times were tough, that he was not taking in any money, and that if appellant wanted appellee to get out of his building, he, appellee, would do so. After some discussion, appellant asked appellee what he would be willing to do and remain in the building, to which appellee replied: "I will pay you \$75.00 a month from now on as long as I stay in the building, and I will get out any time you want me to". To this appellant stated: "You give me \$75.00 and that is O. K." There was some further conversation, appellee stating to appellant that there was a little back rent, but he, appellee, was in no position to pay it, that as appellant was indebted to appellee for some work appellee had done for him, the mutual accounts were, as appellee expressed it, "scratched off". This testimony of appellee was corroborated to some extent by the testimony of Melvin Parker, his employee. Appellant denied that there was ever any talk about reducing the rent to \$75.00 per month. He admitted, however, receiving the checks hereinafter referred to, but testified that those checks

According to the bill of particulars filed by appellant on January 12, 1934, his claim is for rent of the premises for the twelve month period beginning July 1, 1932 and ending June 30, 1933 at \$175.00 per month, amounting to \$2100.00, less a cash credit of \$222.22 and a further credit of \$22.00 for a cash, leaving a balance of \$1855.78 due him, exclusive of attorney fees. His testimony on direct examination was that appellee paid \$175.00 per month until July 1, 1933 and then \$150.00 for a while, and later at various times paid \$75.00, which appellant accepted on account.

According to the testimony of appellee, he and appellant had a conversation in the early part of July 1932, in which appellee stated to appellant that there were many things that he was not taking in any money, and that if appellant wanted appellee to get out of his building, he, appellee, would do so. After this discussion, appellant asked appellee what he would be willing to do and remain in the building, to which appellee replied: "I will pay you \$75.00 a month from now on as long as I stay in the building, and I will get out any time you want me to". To this appellant replied: "You give me \$75.00 and that is all". There was another conversation, appellee stating to appellant that there was a little back rent, but he, appellee, was in no position to pay it, that as appellant was indebted to appellee for some work appellee had done for him, the mutual accounts were, as appellee expressed it, "set off". This testimony of appellee was corroborated to some extent by the testimony of Melvin Barker, his employee. Appellant denied that there was ever any talk about reducing the rent to \$75.00 per month. He admitted, however, receiving the money mentioned in the bill of particulars, but testified that same was

were received and accepted by him on account, but not in full for the rental of the premises at a reduced rental. The checks which appellee produced were eleven in number, one dated each month from July, 1932 to February, 1933, inclusive, one in April, 1933 and two in May, 1933. Nine of these were for \$75.00 each, one was for \$67.25 and one for \$50.00. Each check was signed by appellee and bore the endorsement of appellant, who admitted he received the same. The check for \$67.25 was dated February 6, 1933 and according to appellee's testimony, appellant owed appellee \$7.75 for work, and this check represented the balance due appellant for rent for the month of February, 1933. The check for \$50.00 was dated May 17, 1933, and it, together with the cow which appellee sold appellant, paid the rent for April, 1933. The check for the December rent was dated December 19, 1932 and upon the face thereof are these words: "Rent in full to January 1, 1933". Appellee testified these words were on the check when he delivered it to appellant, who accepted the same. Appellant testified he did not remember seeing these words upon this check when he received it. That when these several checks were given to him by appellee, he told him that the lease called for \$175.00 per month. That appellee replied that times were no good and that appellant then stated he would take the check on account.

Appellant objected to the testimony of appellee and his mechanic as to the conversation which they related as having taken place in the early part of July, 1932, which tended to prove that the rent had been reduced to \$75.00 per month by appellant, and it is earnestly insisted that such evidence was inadmissible as it tended to vary the terms of the written lease of the parties.

were received and accepted by him on account, but not in full for the rental of the premises at a reduced rental. The check which appellee produced were eleven in number, one dated each month from July, 1932 to February, 1933, inclusive, one in April, 1933 and one in May, 1933. Nine of these were for \$15.00 each, one for \$17.25 and one for \$20.00. Each check was signed by appellee and to the order of appellant, who admitted he received the same. The check for \$20.00 was dated February 6, 1933 and according to appellee's testimony, appellant had collected \$17.25 for rent for the month of February, 1933. The check for \$20.00 was dated May 15, 1933, and it, together with the two which appellee sold appellant, said the rent for April, 1933. The check for the December rent was dated December 12, 1932 and upon the face thereof are these words: "rent in full to January 1, 1933". Appellee testified these words were on the check when he delivered it to appellant, who accepted the same. Appellant testified he did not remember seeing these words upon this check when he received it. That when these checks were given to him by appellee, he told him that the checks were for \$15.00 per month. That appellee replied that time and that appellant then stated he would take the check on account.

Appellant objected to the testimony of appellee and his mechanic as to the conversation which they related as having taken place in the early part of July, 1932, which tended to show that the rent had been reduced to \$15.00 per month by appellant, and it is expressly insisted that such evidence was inadmissible as it tends to vary the terms of the written lease of the parties.

Appellant relies particularly on Chapman v. McGrew, 20 Ill. 101, Loach v. Farnum, 90 Ill. 368, Barnett v. Barnes, 73 Ill. 216, Davidson v. Dingeldine, 295 Ill. 367, and Goldsborough v. Gable, 140 Ill. 269. The holdings in these cases sustain the general proposition that the terms of a written lease under seal cannot be varied by parol evidence. Numerous authorities announce this to be the rule. In Barnett v. Barnes, supra, it was held that where a lease, under seal, fixes a certain amount of rent to be paid each month, a parol agreement changing the amount of rent to be paid for the unexpired term and leaving the lease in other respects unchanged and in force, is not binding upon the lessor, and he will, notwithstanding such parol agreement, be entitled to recover the amount of rent called for by the lease. Loach v. Farnum, supra, was a distress for rent proceeding and it appeared that the parties had entered into a written lease under seal, whereby appellees had rented certain premises to appellant for three years from April 1, 1872 at an annual rental of \$800.00, payable in monthly installments of \$66.66 $\frac{2}{3}$ each. Upon the trial appellant offered a written endorsement, but not under seal, which appeared upon the lease. This endorsement was dated February 1, 1874 and was to the effect that appellees agreed to accept \$55.00 per month instead of \$66.66 $\frac{2}{3}$ commencing February 1, 1874. Appellant further offered to prove that for the months of February, March and April, 1874 appellees accepted \$55.00 per month, in full for the rent for those months. This evidence was not admitted by the trial court and in affirming its judgment the Supreme Court held that the agreement for the reduction of the rent was executory, was without any consideration, a mere nudum pactum and not binding upon the lessor.

... a more humane practice and not binding upon the lessee.
... for the reduction of the rent was necessary, was without any con-
... affirming its judgment the Supreme Court held that the agreement
... months. This evidence was not admitted by the trial court and the
... apportioned \$55.00 per month, in full for the rent for those
... to prove that for the months of February, March and April, 1974
... \$55.00 commencing February 1, 1974. Appellant further offered
... effect that apportionment agreed to except \$55.00 per month instead of
... lease. This agreement was dated February 1, 1974 and was to the
... a written endorsement, but not under seal, which occurred upon the
... installments of \$55.00 2/3 each. Upon the trial appellant offered
... from April 1, 1974 at an annual rental of \$660.00, payable in monthly
... by appellees had rented certain premises to appellant for those years
... that the parties had entered into a written lease under seal, and
... February, March, was a witness for rent, testimony and it appeared
... recover the amount of rent called for by the lease. Joseph v.
... and he will, notwithstanding such a contract, be entitled to
... necessary arrangements and in force, is not binding upon the lessee,
... to be paid for the undisturbed term and leaving the lease in other
... paid each month, a person is entitled to the amount of rent
... under a lease, under seal, filed a written contract of rent to be
... to be the rule. In Joseph v. Smith, supra, it was held that
... be varied by parol evidence. Numerous authorities announce this
... position that the terms of a written lease under seal cannot
... 140 Ill. 2d. The holding in these cases within the general
... Davidson v. ... 112 Ill. 2d, and ... v. ...

That no error was committed in refusing to permit appellant to show that appellees had accepted the reduced rent for February, March and April, 1874, as no claim was made by appellees for rent for those months, but only for subsequent months. "The agreement for a reduction was still executory as to subsequent rent", said the court, "and the payments made would be but invalid ratifications and repetitions, so far as the contract remained executory, of an invalid promise and would stand on the same footing as the promise itself". The holdings in these and the other cases cited by appellant are to the effect that where one party obligates himself to pay and another to receive a less amount after both are already legally obligated, the one to pay and the other to receive, a larger amount, such an arrangement is without any consideration to support it. The parties to a written lease under seal cannot by parol agreement, without consideration passing from the lessee to the lessor, reduce the stipulated rental, as such an agreement is a mere nudum pactum and not susceptible of being enforced. While a sealed executory agreement cannot be altered, modified or changed by parol agreement, it may be canceled by a parol agreement and an executed parol agreement may be shown to defeat a recovery upon an instrument under seal, and although the parol agreement may have been without consideration, it may become the basis of an equitable estoppel. *Yockey v. Marion*, 269 Ill. 342, *Snow v. Griesheimer*, 220 Ill. 106, *Boyle v. Dunne*, 144 Ill. App. 14, *Levy v. Greenberg*, 261 Ill. App. 541.

In *Snow v. Griesheimer*, 220 Ill. 106, it appeared that the parties thereto had entered into a lease under seal by the terms of which a store building in Chicago was leased for a term of three years, ending April 30, 1898 at a term rental of \$18,000.00, payable in monthly installments of \$500.00 in advance on the first of each month. The evidence was that in the Spring of 1896 there was an

in monthly installments of \$500.00 in advance on the first of each year, ending April 30, 1936 at a term rental of \$18,000.00, payable of which a store building in Chicago was leased for a term of years. The parties thereto had entered into a lease under seal by the terms of which a store building in Chicago was leased for a term of years.

In *Shaw v. Grisham*, 230 Ill. 106, it appeared that the parties thereto had entered into a lease under seal by the terms of which a store building in Chicago was leased for a term of years. It may become the basis of an equitable estoppel. *Yockey v. Marion*, 239 Ill. 342, *In re v. Grisham*, 230 Ill. 106, *Yockey v. v. Burns*, 144 Ill. App. 14, *Levy v. Greenberg*, 231 Ill. App. 211.

though the oral agreement may have been without consideration, it is shown to defeat a recovery upon an instrument under seal, and altered, modified or changed by parol agreement, it may be annulled by a parol agreement and an executed parol agreement may be being enforced. While a sealed executory agreement cannot be such an agreement is a mere nuda pactum and not enforceable of from the lease to the lessor, reduce the stipulated rental, as seal cannot by parol agreement, without consideration resulting alteration to support it. The parties to a written lease under receive, a larger amount, such an arrangement is without any consideration to pay and another to receive a less amount after both parties are to the effect that where the party obligated by promises itself. The holding in these and the other cases cited of an invalid promise and would stand on the same footing as the terms and conditions, no law as the contract remained executory, the court, and the payments made would be but invalidation for a rescission was still necessary as to subsequent rent", said for those months, but only for subsequent months. "The agreement March and April, 1934, as no claim was made by appellee for rent show that appellee had accepted the reduced rent for February, that no error was committed in refusing to permit appellee to

agreement reducing the rent to \$416.66 each month. The testimony for the lessor was that the reduction was for the Summer months of 1896, after which the rent was to be the same as before and that the reduction was made because the lessee complained that business was poor and he was losing money. The testimony of the lessee was that the reduction was for the remainder of the term, made in consideration of his making certain repairs which he did. The rent was paid according to the terms of the lease up to May 1, 1896. Thereafter the lessee paid \$416.66 for the remainder of the term by checks which on their face disclosed they were in full for the rent and were so offered by the lessee. The lessor received and collected these checks but did not assent to the claim that they were in full of the rent after the Summer months of 1896 and the checks were only credited by the lessor on account. The court after stating that it was settled law that an executory contract under seal cannot be modified or changed by an agreement not under seal held that so long as the contract contained in the lease remained executory the lessor had a right to repudiate the parol agreement and claim the full amount of rent contracted for. That the judgment of the Appellate Court in affirming the judgment of the Circuit rendered in favor of the lessee was conclusive as to the provisions of the parol contract made in the Spring of 1896 and that as the lease was thereby modified and as modified had been executed by the parties it was no longer an executory contract but an executed one and not subject to being disturbed and evidence that it had been performed was competent. In commenting upon the fact that the lessor refused to receive the checks tendered as rent in full payment of the rent accruing after the Summer months of 1896 and protested to the lessee that they were only received on account,

[illegible]

the court said: "The checks purported on their face to be in full payment and there is no dispute that they were sent as payment in full: that plaintiff's agents so understood it and that they were received and collected. The law is, that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand, but if the amount is unliquidated or there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor, is a satisfaction of the claim. It is not necessary that the debtor shall pay more in such a case than what he admits to be due, and if a check for such sum is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered or must be rejected. If a check is offered under such circumstances as amount to a condition that it is to be received in full payment of the demand, an acceptance will satisfy the demand, although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. An acceptance in such a case is an acceptance of the condition, notwithstanding any protest he may make to the contrary".

In *Levy v. Greenberg*, 261 Ill. App. 541, the *Snow* case, *supra*, was followed and it was held that the test in a case of this character is not whether there was a consideration for the reduction of the rent, but whether the gift was executed or unexecuted, that reductions in rental are to be regarded as gifts of separate and distinct items each month and when the reduced rental is paid and accepted, the gift is complete and irrevocable and the fact that the term under the lease had not expired was immaterial.

[illegible]

In 16 R. C. L. 924, it is stated that as a general rule, a voluntary agreement of a lessor, made during the term of a lease, to reduce the rent there stipulated, to be valid and enforceable in so far as it remains unexecuted, must be supported by a new consideration. "But it is held", continues the text, "that if the lessor orally agrees to reduce the rent, and to accept a less sum than stipulated for, and such agreement is carried out for a number of years by the payment by the tenant and the acceptance by the lessor of such rent as reduced, and the giving of the receipts therefor as in full of all rent to date of said receipts, the lessor will be regarded as having made a valid gift to the tenant of the difference between the rent paid and that stipulated for in the lease, and cannot recover of the latter the amount so given him".

In view of the foregoing authorities we are clearly of the opinion that the evidence of appellee and the witness Parker, when considered in connection with the other evidence, which appears in this record was competent and there was no error in overruling appellant's objections thereto. The issue presented to the jury as to whether there was a subsequent oral agreement to reduce the rent and whether that agreement, if made, was executed were questions of fact for the jury to determine. It is not insisted that the jury were improperly instructed as to the law and we are not disposed to say that the findings of the jury, approved as they have been by the trial court, are contrary to the weight of the evidence.

At the time judgment was entered, the lease had not expired. Appellee vacated the premises on June 2, 1933, at which time the rent for that month had accrued and had not been paid according to the terms of the lease. Appellee, therefore, is concededly liable to appellant for rent under the terms of the lease for the month of June, 1933 to the amount of \$175.00, to-

gether with attorney fees as provided by the lease. Under the provisions of the Civil Practice Act, Cahill Ill. Rev. Statute, 1935, Chap. 110, Par. 220, Sec. 92, this court may enter the judgment which should have been entered in the trial court.

The judgment of the Circuit Court of Warren County is reversed and judgment is rendered in this court in favor of appellant and against appellee for \$218.75. Appellee will pay the costs in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

together with attorney fees as provided by the lease. Under the
provisions of the Civil Practice Act, Chapter 111, Section 111,
§ 111, Chap. 110, Sec. 111, this court may enter the
judgment which should have been entered in the trial court.
The judgment of the Circuit Court of Western County is
reversed and judgment is rendered in this case in favor of ap-
pellant and against appellee for \$218.42. Appellee will pay the
costs in this court.
JUDGMENT HEREOF AND THE COURT SO ORDER.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

777
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 647⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 22 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1935.

EXPOSITION PARK JOCKEY CLUB for
use of BENTLEY-MURRAY COMPANY,

Appellants,

vs.

HARRY A. CRAWFORD,

Appellee.

APPEAL FROM THE CIRCUIT
COURT OF KANE COUNTY.

DOVE, J.

On May 10, 1933 Bentley, Murray & Company, a Corporation, instituted its suit in assumpsit in the Circuit Court of Kane County against Exposition Park Jockey Club, also a corporation, Robert Eddy and Joseph Catarrinich, seeking to recover the sum of \$6665.18. On the same day a writ of attachment in aid was issued, directed to the Sheriff of Kane County, who was, at that time, Harry A. Crawford, appellee herein. On the same day appellee executed the writ and endorsed thereon that he had attached ~~\$6665.18~~ ^{\$6665.18} ~~at the~~ at the same time left a true copy of the writ with Joseph Catarrinich, manager of the Mutuel Department of the defendant, Jockey Club. The cause was subsequently tried, resulting in a finding in favor of all the defendants upon the attachment issue and for the defendants, Joseph Catarrinich and Robert Eddy, upon the assumpsit issue and for the plaintiff and against the Jockey Club upon the assumpsit issue. Upon these findings judgment was rendered on November 10, 1933, quashing the writ of attachment and for the plaintiff and against the Jockey Club for \$6665.18.

IN THE

COURT OF COMMON PLEAS

OF THE COUNTY OF ALBANY

February Term, 1901.

THE PEOPLE OF THE COUNTY OF ALBANY,
Plaintiff,
vs.
JOSEPH G. GARDNER,
Defendant.

JOSEPH G. GARDNER, Plaintiff,
vs.
THE PEOPLE OF THE COUNTY OF ALBANY,
Defendant.

Appeal.

vs.

JOSEPH G. GARDNER, Plaintiff,

vs.

1901.

On May 10, 1900, Henry & Company, a corporation,

located in the City of Albany, in the County of Albany,

did cause to be filed in the County of Albany, a certain

petition, in which it was stated that the said Henry & Company,

did cause to be filed in the County of Albany, a certain

petition, in which it was stated that the said Henry & Company,

did cause to be filed in the County of Albany, a certain

1900.

the said Henry & Company, did cause to be filed in the County of Albany,

the said Henry & Company, did cause to be filed in the County of Albany,

the said Henry & Company, did cause to be filed in the County of Albany,

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the said Henry & Company, did cause to be filed in the County of Albany,

the said Henry & Company, did cause to be filed in the County of Albany,

the said Henry & Company, did cause to be filed in the County of Albany,

1901.

On November 20, 1933 execution was issued upon this judgment and on the same day returned "no property found". Subsequently an affidavit for garnishee summons was filed, upon which a garnishee summons was duly issued against appellee, who entered his special appearance therein and moved to quash the writ on the grounds that as sheriff he was not subject to garnishment. On February 7th, 1934 this motion of appellee to quash the writ of garnishment was allowed and the writ quashed. On the same day a second garnishee summons was issued and served on appellee. On February 7, 1934 interrogatories were filed and answered. To this answer a replication was filed and on July 13, 1934 the cause was heard by the court without a jury resulting in the writ of garnishment being dismissed. And it is from this judgment that the record is brought to this court for review by appeal.

At the hearing appellant called appellee as a witness, who testified that the sum of \$6665.18 seized by him under the attachment writ in the original case was deposited in a special account in the State Bank of Geneva on May 19, 1933 and remained there on deposit to his credit as sheriff until February 2, 1934, when it was withdrawn by appellee and paid by him to D. C. Burnett, as agent and attorney in fact of Joseph Catarrinich. Appellant also offered in evidence a receipt of Catarrinich, acknowledging the receipt of this money on February 2, 1934 from appellee, the receipt stating that said sum of \$6665.18 was taken from Catarrinich by appellee by virtue of the writ of attachment issued on May 10, 1933 and that it was returned to Catarrinich in pursuance to an order entered in the attachment proceedings. This judgment was entered on November 10, 1933 and it not only quashed the writ of attachment but also directed appellee to return the money attached to the party from whom it was taken.

[illegible]

Appellant contends that this sum of \$6665.18 was taken from and belonged to Exposition Park Jockey Club, but the evidence clearly discloses that it did not belong to Exposition Park Jockey Club, but belonged to Joseph Catarrinich, manager of the Pari-Mutuel Department thereof.

The appellant makes a further contention that when the attachment was quashed, the court should have ordered the funds attached returned to the Jockey Club and that the court also erred in refusing to allow an amendment to be made to the first affidavit for garnishment which was filed November 20, 1933. There is no merit in either of these contentions. This is not an appeal from the judgment quashing the attachment and ordering the funds attached returned to the party from whom they were taken nor is it an appeal from the judgment quashing the first writ of garnishment, but is an appeal from the judgment quashing the second writ and hence these matters of which appellant complains are not before us. The rule in this state is that a judgment creditor by garnishment proceedings may recover only such indebtedness as his debtor might recover in an action of debt or assumpsit against the garnishee. *Wold v. Glens Falls Indemnity Co.*, 269 Ill. App. 407.

In this garnishment proceeding the burden of proof is upon the beneficial plaintiff to show that the garnishee has in his hands money or property belonging to the Jockey Club at the time of the service of the garnishment writ. The judgment which this court is now reviewing was entered in a proceeding instituted five days after appellee, the garnishee, had paid the money sought to be reached to the party from whom he had taken it several months previous. Concededly there was no money or property in appellee's hands at the time the garnishment writ was served on appellee, or thereafter, subject to garnishment and the trial court entered the only judgment which could have been entered upon the facts as they appear in this record, and its judgment will be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

787
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 648 /

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 22 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1935.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,

Defendant in Error,

vs.

CHARLES C. HOGE, CARRIE T. HOGE,
et al., (S. Roy Hoge, Eleanor
Weir and Mabel Manchester and
Harry C. Daniels, Guardian Ad
Litem and Trustee of Interests of
Future Issue, and John H. Raymond,
Guardian Ad. Litem),

Plaintiffs in Error,

S. ROY HOGE, ELEANOR WEIR AND
MABEL MANCHESTER, Cross Complain-
ants (S. Roy Hoge, Eleanor Weir and
Mabel Manchester, Harry C. Daniels,
Guardian Ad Litem and Trustee of
Interests of Future Issue and John
H. Raymond, Guardian Ad Litem),

Plaintiffs in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, a Corporation, et al.,
Cross Defendants,

Defendants in Error.

WRIT OF ERROR TO THE
CIRCUIT COURT OF
KENDALL COUNTY.

DOVE, J.

"Defendant in error, The Prudential Insurance Company of
America, filed its bill in the Circuit Court of Kendall County,
seeking to foreclose a mortgage securing the payment of a note in

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THE UNIVERSITY OF MICHIGAN LIBRARY
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TO YOUNG MORRIS INTERNATIONAL, INC.
1000 N. CENTRAL AVENUE
SUITE 1000
DENVER, COLORADO 80202

Delegatus in loco

45

10. The following information is being furnished to you for your information:

the sum of Ninety-six Thousand Dollars (\$96,000.00), which had been executed by Charles C. Hoge and Carrie T. Hoge, his wife. The land described in the mortgage so sought to be foreclosed was in part devised to the mortgagor by his deceased father, Samuel Hoge, and in part by his deceased mother, Matilda Hoge. In his bill, defendant in error set forth that Eleanor Weir, Mabel Manchester and S. Roy Hoge, the children of Charles C. Hoge, deceased, and other descendants of Samuel and Matilda Hoge, claim some right, title or interest in the premises sought to be foreclosed, but alleged that they had no such interest, and in addition to a decree of foreclosure prayed that these persons might be adjudged to have no title to the land nor any interest in it. Eleanor Weir, Mabel Manchester and S. Roy Hoge filed answers and a cross bill, setting forth the wills of Samuel Hoge and Matilda Hoge. They prayed that the title of Charles C. Hoge, the mortgagor, might be determined to be a base or determinable fee, with executory devise over to the cross complaints so far as the will of Samuel Hoge passed any title, and a life estate, only, with the contingent remainder over to the cross complainants upon the death of Charles C. Hoge so far as the will of Matilda Hoge was concerned. An answer to the cross bill was filed. A Guardian Ad Litem was appointed for minors and a trustee for the future issue of unborn children. Replications followed in due course and upon a hearing, the Chancellor construed the wills of Samuel Hoge and Matilda Hoge as vesting Charles C. Hoge with a fee simple title, ordering a dismissal of the cross bill and decreeing foreclosure for the amount found to be due."

The foregoing statement of facts is taken from the opinion of the Supreme Court, from which court the cross complainants sued out

the sum of Ninety thousand Dollars (\$90,000.00), which had been donated by Charles C. Hope and Gertrude E. Hope, his wife. The land described in the petition as being to be sold was in part devised to the respondent by his deceased father, Samuel Hope, and in part by his deceased mother, Estlin Hope. In his will, defendant in error left to his wife, Gertrude E. Hope, the sum of Ninety thousand Dollars (\$90,000.00), and other personal property, and other real estate, and other interests in the various lands to be foreclosed, but alleged that they had no such interest, and in effect to a decree of foreclosure argued that these lands should be subject to him as to the land and any interest in it. The court said, "The defendant and C. C. Hope filed answers and a cross bill, setting forth the will of Samuel Hope and Estlin Hope. They prayed that the title of Charles C. Hope, and Estlin Hope, should be determined to be a trust or beneficial use, with executory devise over to the cross complainants as far as the will of Samuel Hope passed any title, and a life estate, only, with the contingent remainder over to the cross complainants upon the death of Charles C. Hope as far as the will of Estlin Hope was concerned. The answer to the cross bill was filed. The court at first was inclined to grant the prayer for the relief asked in the cross bill, but finally refused to do so, and upon a hearing, the Chancellor construed the will of Samuel Hope and Estlin Hope as vesting Charles C. Hope with a fee simple title, subject to a disclaimer of the cross bill and decreeing that the land should be sold to pay the debt."

The foregoing petition is taken in part from the answer of the respondent, and from other sources, and is not intended to be a full and complete statement of the facts of the case.

a writ of error. (The Prudential Insurance Company of America v. Charles C. Hoge, et al., 359 Ill. 36.) The Supreme Court held that a freehold was not involved and therefore it had no jurisdiction notwithstanding the fact that title to the land covered by the mortgage was put in issue by the pleadings. In its opinion, transferring the cause to this court, the Supreme Court said: "Those allegations in the bill of complaint whereby an attempt was made to quiet the title of the mortgagor, and those allegations of the cross bill seeking a construction of the wills and a decree as to the title to a free hold, were not germane to the proper subject matter of the suit, and the findings of the Chancellor thereon are surplusage and not only not necessary to the decree of foreclosure, but were improper. - * * The rule in Illinois is, that where a party does not claim title through or under either mortgagee or mortgagor, he is neither a proper or a necessary party to the foreclosure proceeding and should be dismissed from the suit. (Gage v. Perry, 93 Ill. 176). In Whitaker v. Irons, 300 Ill. 254, we said: 'The only proper parties to a bill to foreclose a mortgage are the mortgagors and the mortgagee and those who acquired rights under them subsequent to the mortgage'. The only effect the decree in this case can have is to foreclose the lien of defendant in error as against whatever title it received by the mortgage in question".

The only contention made and argued by plaintiffs in error in this court is that the Chancellor erred in construing the wills of Samuel Hoge and Matilda Hoge and in decreeing that Charles C. Hoge, the mortgagor, was vested with a fee simple title under the provisions of those wills and therefore the decree dismissing the cross bill was erroneous. It is conceded that defendant in error

a bill of error. (The "Trustees of the University of the State of New York v. Charles C. Cook," 21 N.Y. 2d 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

is entitled to a decree of foreclosure and it is not contended that there was any error in finding the amount which was due it under the provisions of its mortgage.

Under the authorities, plaintiffs in error were neither necessary or proper parties to this litigation and the findings in the decree to the effect that under the wills of Samuel Hoge and Matilda Hoge, the mortgagor, Charles C. Hoge, took a fee simple title have no place in the decree and should be expunged therefrom.

The decree therefore will be modified by this court by striking out those improper portions thereof. Insofar as the decree directs a dismissal of the cross-bill of plaintiffs in error and decrees a foreclosure of the mortgage of defendant in error it is affirmed. The costs in this court will be taxed one-half to plaintiffs in error and one-half to defendant in error.

DECREE MODIFIED AND AS MODIFIED AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

79 #
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 648²

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 22 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois
Second District

February Term, A. D. 1935.

Leah Pearsall,

Appellee,

vs.

Harry T. Campbell,

Appellant.

Appeal from the Circuit Court

of De Kalb County

HUFFMAN-J.

This was an action for damages brought by appellee against appellant for personal injuries resulting from an automobile collision which happened in August, 1932. It appears from appellant's brief that the case was tried by a jury, but it does not appear therefrom that a verdict was rendered, or in whose favor it was rendered, or that any judgment in this case was entered by the trial court. Appellant assigns no errors for reversal, and argues no errors for reversal. The abstract fails to show what the verdict of the jury was, in whose favor it was, or what the judgment of the court was. There is nothing before this court upon which to pass.

For the foregoing reasons, the judgment of the trial court herein is affirmed.

Judgment affirmed.

In the Appellate Court of Illinois

Second District

February Term, A. D. 1935.

Leon Pennell,

Respondent,

Appellant from the Circuit Court

vs.

of De Kalb County

Harry E. Campbell,

Appellant.

REVEREND J.

This was an action for damages brought by appellee against
appellant for personal injuries resulting from an automobile collision
which happened in August, 1932. It appears from appellant's
plea that the case was tried by a jury, but it does not appear
therefrom that a verdict was rendered, or in whose favor it was
rendered, or that any judgment in this case was entered by the
trial court. Appellant assigns no errors for reversal, and
argues no errors for reversal. The abstract fails to show what
the verdict of the jury was, in whose favor it was, or what the
judgment of the court was. There is nothing before this court
upon which to pass.
For the foregoing reasons, the judgment of the trial court
herein is affirmed.
Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

807

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

200 I.A. 48

279 I.A. 648³

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 22 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
FEBRUARY TERM, A. D. 1935.

| | | |
|----------------|---|----------------------------------|
| LILA HILL, |) | |
| |) | |
| Appellee, |) | |
| |) | APPEAL FROM THE CIRCUIT COURT OF |
| VS |) | |
| |) | LAKE COUNTY. |
| GEORGE MARTIN, |) | |
| |) | |
| Appellant. |) | |

HUFFMAN-J

Appellee secured a verdict against appellant for the sum of \$300 because of injuries received by her while riding with him as a guest in an automobile, and alleged to have been received because of his wilful and wanton misconduct.

Appellant prosecutes this appeal from the judgment of the trial court upon the verdict. There is only one question involved in this case, and that is, whether the evidence when considered, with all reasonable inferences drawn therefrom, in the most favorable aspect to appellee, is sufficient to establish wilful and wanton misconduct on the part of appellant. The facts in the case are as follows: Appellant, accompanied by Bernice Christensen, attended a banquet at the Waukegan Township High School. They met appellee at that place. Appellant did not know appellee. Miss Christensen knew appellee and with appellant's consent invited appellee to ride with them to her home. Appellant was driving a Studebaker automobile, which the evidence shows was in good working order. The accident occurred some three or four blocks from the school building.

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Yamamoto, T. 1990.

Some of his gifts and various misadventures.

was a guest in an automobile, and alleged to have been received for
 at \$500.00 amount of interest received by his wife during the same
 period. (Enclosed herewith are various receipts and other documents)

Special prosecutor this appeal from the judgment of the trial court upon the verdict. There is only one question involved

...on the part of applicant. The facts in the case are as follows: ... is sufficient to establish willful and wanton violation of ...

Appellant, accompanied by Service Officers, attended the funeral at the Waukegan Township High School. They met several people who knew Appellant. Appellant did not know anyone at that place. Appellant did not know anyone at that place.

On the night of the murder, appellant was driving a Volkswagen car.

The evidence is short and is not conflicting. Appellee's evidence discloses that she was employed as a maid; that she was at the school on the evening of January 11th, 1934; that following the banquet, she left the school building in company with appellant and Miss Christensen for the purpose of riding with them to her home. She testifies that it was raining slightly and the streets were "a little slippery," but not frozen. Miss Christensen testified for appellee regarding the accident. Her testimony was confined to a statement that she was familiar with the streets over which they were travelling, giving the direction thereof, and that when the accident occurred, appellee was cut on and about the face and head because of a broken windshield. Appellant testified as a witness for appellee. His testimony merely went to his acquaintance with the place of the accident, the make of car he was driving, and his age. Albert L. Hall, the driver of the car with which appellant collided, testified for appellee. His testimony disclosed that the street where the accident occurred was on a hillside, and the pavement was slippery. He estimated appellant's speed at from twenty-five to thirty miles per hour. Appellant giving testimony upon his own behalf estimated his speed at twenty-five miles per hour.

Appellant states that appellee was riding as a guest in his car and that he was taking her to her home at the request of Miss Christensen; that his car was in good mechanical condition; that upon leaving the school building he started the car; that in travelling to the place of the accident, he had stopped and started the car at different street intersections, and had experienced no difficulty because of the condition of the pavement; that his car had not skidded at any of these times; that the pavement seemed to be covered with a light frost which had not caused his car to skid. Miss Christensen

[illegible]

testified for appellant, and estimated the speed of the car to be between twenty and twenty-five miles per hour. She further stated that nothing was said by either appellee or herself requesting appellant to drive more slowly.

at the place of the accident there is a hill and a curve. When appellant started down this incline and attempted to apply his brakes, his car skidded to the left and struck the car in which Mr. Hall was then riding. The impact of the collision appears to have thrown appellee against the windshield. The windshield broke and appellee sustained painful and extensive cuts and lacerations on and about her face and head.

Appellant moved for a directed verdict at the close of the plaintiff's evidence and at the close of all the evidence. Both motions were denied and the instructions refused. Appellant urges that the evidence failed to establish wilful and wanton misconduct on his part, and that the court erred in refusing to instruct the jury to find appellant not guilty. While the question of wilful or wanton misconduct is usually a question of fact for the jury, yet where all the evidence, viewed in its most favorable light for the plaintiff, does not tend to show a wilful and wanton act done, and where proof of such act is essential to the right of recovery, the jury should be directed to find a verdict for the defendant. Before it becomes a question of fact to be determined by the jury, there must be some evidence fairly tending to show a wilful disregard of a known duty and of the consequences likely to flow therefrom, or a willingness to inflict the injury.

An examination of the evidence presented by this record, when considered in the most favorable light to appellee, fails to establish wilful or wanton misconduct on the part of appellant. Appellee being injured while riding in appellant's automobile as a

testified that he saw the car on the road between twenty and twenty-five miles per hour. He further stated that he did not see the car until it was within fifty feet of him.

At the place of the accident there is a hill and a curve. The defendant stated that this hill and curve is only his view of the car which he saw at the time of the accident. He stated that the car was in the left and right lane at the time of the accident. The location of the accident appears to have been on the right side of the road. The defendant stated that he saw the car on the right side of the road.

The defendant stated that he saw the car on the right side of the road. He stated that the car was in the left and right lane at the time of the accident. The location of the accident appears to have been on the right side of the road. The defendant stated that he saw the car on the right side of the road.

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guest, without payment therefor, is barred from any action against appellant for any injuries received because of negligence, and can only recover in the event injuries received are received because of wilful and wanton misconduct of appellant. Ch. 95A, Sec. 43 (b), Cahill's St. 1933.

The record shows Dr. George B. Callahan, a physician and surgeon of the city of Saukewan, attended appellee; that she was severely cut on and about the face and head; that a great many stitches were necessary in the treatment of appellee's wounds; that it took about three and a half hours to administer to appellee following her injuries; that she was in the hospital for more than a week; that the doctor visited her three or four times a day; that she was disabled for about five weeks, and still has some distortion of the lip due to scar. The doctor's services and the hospital bills practically equal the amount of the judgment. It is unfortunate that such kind and capable treatment of an unfortunate person may go unpaid. But in order to constitute wilful and wanton misconduct, the injury must have been either intentionally inflicted or produced by such grossly careless conduct as to exhibit a wilful disregard for the safety of others, with a full knowledge of the impending danger, and the failure to exercise ordinary care to prevent it. It is not without extreme regret at the necessity made by the above statute, that this court decides this case. We can but accept the statute as written and the matter therefore becomes a duty which must be performed.

There is no evidence in the record tending to prove wilful and wanton misconduct upon the part of appellant. We therefore find, as an ultimate fact to be incorporated in the judgment, that the evidence in this case does not tend to show or demonstrate wilful and wanton misconduct on the part of appellant, or that appellee sustained the injuries complained of because of any wilful and wanton misconduct

...without payment therefor; it is not from any action or claim
...for any injury received because of negligence, and can
...only recover in the event injuries received are received because of
...injury and upon mismanagement of a patient. Ch. 88, Sec. 13 (b),
California, 1933.

The record at the Dr. Walter J. ... a physician and sur-
geon of the city of Berkeley, attended a ... that the ...
ly out on and about the ... that a ...
... necessary in the ... of ...
... three and a half hours to ...
injuries; that she was in the hospital for more than a week; that
the doctor visited her three or four times a day; that she was a ...
... the ... of the ...
due to ... The doctor's ...
only equal the amount of the ... it is ...
kind and ... of an ...
... in order to ...
... have been ...
... to ...
... of ... with a ...
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this court decides this case. We can ...
... and the ...
There is no ... in the ...
... upon the part of ...
... an ... in the ...
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... of ...

on the part of appellant. The trial court should have directed a verdict for appellant, in response to appellant's motion made therefor. On account of this error, the cause is reversed without remanding.

Judgment reversed.

...the first of the ...
...in ...
...the ...

...the ...

STATE OF ILLINOIS, }

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

81 H
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and thirty-five,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 648⁴

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 22 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1935

Wm. C. De Wolf,

Appellee,

Appeal from the Circuit Court

vs.

of Boone County

Andrew A. Mulligan, Chairman
of the Boone County Board of
Supervisors, et al,

Appellants.

HUFFMAN-J.

This was a mandamus proceeding brought by appellee as petitioner against the county of Boone, the County Clerk, County Treasurer, and members of the Board of Supervisors of said county, seeking to cause the said Board of Supervisors to convene in a special session and to levy a tax for the purpose of payment to petitioner of a pension claimed due under the Judges Pension Law, Ch. 37, Secs. 31, 32, Cahill's St. 1933. Appellee claimed benefit of said statute by virtue of having served in the capacity of County Judge of said county for a period of twenty-four years. He further alleged that he had reached the age of sixty-five years, and set up that by virtue of said statute, the county of Boone was thereby obligated to pay him a pension of \$750 per year. The respondents to said petition filed a general demurrer thereto, which was overruled. They then presented their answer to said petition, which the court denied respondents leave to file and entered an order that said petition be taken as true against respondents, and directed that a peremptory writ of mandamus issue in favor of the petitioner (appellee herein) and against respondents, directing the members of the Board of Supervisors of said county to convene within twelve days and to levy a tax or provide funds for the payment of a pension to petitioner as prayed; and that the County Clerk should extend

IN THE SUPREME COURT OF ILLINOIS

— PETITION —

JOHN W. TOWN, A. B. 1900

vs. W. C. De Wolf,

Appel from the Circuit Court

of Boone County

Andrew A. Milligan, Chairman
of the Boone County Board of
Supervisors, et al,

Respondents.

— PETITION —

This was a mandamus proceeding brought by appellee as petitioner against the county of Boone, the County Clerk, County Treasurer, and members of the Board of Supervisors of said county, seeking to cause the said Board of Supervisors to convene in a special session and to levy a tax for the purpose of payment to petitioner of a pension claimed due under the Judges Pension Law, Ch. 37, Secs. 31, 32, 33, 34, et al. 1903. Appellee claimed benefit of said statute by virtue of having served in the capacity of County Judge of said county for a period of twenty-four years. He further alleged that he had reached the age of sixty-five years, and set up that by virtue of said statute, the county of Boone was thereby obligated to pay him a pension of \$750 per year. The respondents to said petition filed a general demurrer thereto, which was overruled. They then presented their answer to said petition, which the court denied respondents leave to file and entered an order that said petition be taken as true against respondents, and directed that a peremptory writ of mandamus issue in favor of the petitioner (appellee herein) and against respondents, directing the members of the Board of Supervisors of said county to convene in a special session and to levy a tax on prothon Tunda for the payment of a pension to petitioner as prayed, and that the County Clerk should return

the proper tax to raise the necessary funds and issue warrants to petitioner upon the Treasurer of said county for the pension fund due.

In a mandamus proceeding such as this, the defendant may plead or answer, as he elects. Ch. 87, Sec. 2 et seq., Cahill's St. 1933; People v. Powell, 274 Ill. 222. If the answer traverses by direct denial any facts alleged in the petition upon which the claim of the relator is founded, this raises a question of fact, and such facts charged in the petition and denied by the defendant, must be proved by the relator. This necessarily requires a hearing on the merits, and the parties have the right to have the issue of fact tried by a jury. People v. Czaszewicz, 295 Ill. 11. The defendants have the legal right to answer the petition. If the petitioner is of the opinion that the defense set up by the answer is insufficient, he may demur thereto, and the question as to the sufficiency of the answer is then properly before the court for the first time. After a general demurrer to the petition for the writ has been disposed of, the respondent may, at his election, abide by the demurrer or answer the petition. Hartman v. City of Chicago, 198 Ill. App. 372.

The respondents claim their answer controverted facts set forth in the petition upon which the claim of the relator is based. Under such circumstances, we are of the opinion the court erred in refusing them the right to file same. Should they not have filed a sufficient answer in law to the petition, the petitioner could have raised this by demurrer and the matter would have then been disposed of in such a manner as to have presented to this court a definite issue of law to decide. If the answer of the respondents challenges the facts set forth by petitioner upon which he bases his claim, we know of no other way the same may be properly determined than by a hearing on the merits.

As the record stands before this court, we are of the opinion
the trial court erred in denying respondent's right to file
their answer, and to consider the case in such manner as the peti-
tioner might elect to proceed.
The judgment of the trial court is therefore reversed and
this cause remanded for further proceedings in conformity with the
views herein expressed.
Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

279 I.A. 6491

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 22 1935 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1935

City of Wheaton,

Appellee,

vs.

Appeal from the Circuit Court

of Du Page County

Edward Howard,

Appellant.

HUFFMAN-J.

Appellant was convicted in the circuit court of Du Page county for violation of that section of the city ordinances of the city of Wheaton, making it unlawful to engage in peddling without a license. Jury was waived and trial had before the court. The court found the issues against appellant, and assessed appellee's damages at the sum of \$25. Appellant prosecutes this appeal from the judgment against him.

The evidence shows that on May 21, 1933, appellant, together with fifty or more other people, went from Chicago to Wheaton in the capacity of "Messengers of Jehovah." Appellant states that his occupation is that of "Jehovah's Witness," and that he is engaged in no other work or employment. Appellant went from house to house in the city of Wheaton, with certain printed books which he sought to place in the hands of the people for a small contribution of twenty-five cents and five cents." The evidence shows that appellant had one book for which he required a contribution of twenty-five cents, and two books for which he required a contribution of five cents each. He had not secured a license to sell these books in the city of Wheaton. His testimony discloses that he and the other people went to Wheaton for the purpose of going from house to house over the entire city with the books in question; that they all carried the same books and asked for the same contribution therefor. Appellant

In the Criminal Court of Illinois

Second District

February Term, A. D. 1923

City of Wheaton,

Appellee,

Appeal from the Circuit Court

of Du Page County

vs.

Edward Howard,

Appellant.

HUTCHINS-7.

Appellant was convicted in the circuit court of Du Page county for violation of that section of the city ordinance of Wheaton, Illinois, making it unlawful to engage in peddling without a license. Jury was waived and trial had before the court. The court found the issues against appellant, and assessed appellee's damages at the sum of \$25. Appellant presented this appeal from the judgment against him.

The evidence shows that on May 21, 1922, appellant, together with fifty or more other people, went from Wheaton to Wheaton in the capacity of "Messengers of Jehovah." Appellant states that his occupation is that of "Jehovah's Witness," and that he is engaged in no other work or employment. Appellant went from house to house in the city of Wheaton, with certain printed books which he sought to place in the hands of the people for a small contribution of twenty-five cents and five cents. The evidence shows that appellant had one book for which he required a contribution of twenty-five cents, and two books for which he required a contribution of five cents each. He had not secured a license to sell these books in the city of Wheaton. His testimony discloses that he and the other people went to Wheaton for the purpose of going from house to house over the entire city with the books in question; that they all carried the same books and asked for the same contribution therefor. Appellant

states that he delivered about five books in Wheaton on that day; that he offered them at a great many residences, going from house to house; that when he showed the large book, twenty-five cents was the contribution he required for it, and five cents was the contribution he required for each of the smaller books.

A police officer of said city saw appellant soliciting persons to buy the books. He asked appellant how much the books were, and appellant told him that one was twenty-five cents and the others five cents each. The police officer bought a copy of the twenty-five cent book which was entitled "Vindication," and a copy of each of the smaller books entitled, "Where are the Dead", and "Home and Happiness," paying appellant therefor the sum of thirty-five cents. Appellant had other copies of the books with him at this time, and after the police officer purchased his copies, appellant proceeded on his way to the next house. The officer thereafter watched appellant while he solicited sales of the books at residences upon three other streets. The officer then placed appellant under arrest, at a house located on the corner of Indiana and Chase streets, where he was engaged in endeavoring to sell the books. Appellant at the time, was engaged in conversation with the occupant, at the door. The occupant stated to the officer in the presence of appellant, that appellant was trying to sell the books to him.

Appellant makes no assignment of errors relied upon for reversal, and sets out no propositions of law and the authorities relied upon to support them, as required by rule nine of this court. Appellant takes the position that he was a member of a missionary band engaged in preaching the gospel of "Jehovah's Kingdom", in the capacity of a witness, and the distribution of the books as he was making same, he considered a "commandment of Jehovah."

While appellant's brief is inadequate under the rules of this court, to properly present this case for review, yet we have carefully

stated that he delivered about five books in Boston on that day; that he offered them at a great many residences, going from house to house; that when he showed the large book, twenty-five cents was the contribution he required for it, and five cents was the contribution he required for each of the smaller books.

A police officer of said city saw appellant distributing books about the books. He asked appellant how much the books were, and appellant told him that one was twenty-five cents and the others five cents each. The police officer bought a copy of the twenty-five cent book which was entitled "Evangelism," and a copy of each of the smaller books entitled, "Where are the Dead," and "Home and Tabernacle," paying appellant therefor the sum of thirty-five cents. Appellant had other copies of the books with him at that time, and after the police officer purchased his copies, appellant proceeded on his way to the next house. The officer thereafter returned appellant while he solicited sales of the books at residences upon those other streets. The officer then placed appellant under arrest, at a house located on the corner of Indiana and Chase streets, where he was engaged in endeavoring to sell the books. Appellant at the time, was engaged in conversation with the occupant, at the door. The occupant stated to the officer in the presence of appellant, that appellant was trying to sell the books to him.

Appellant makes no assignment of errors relied upon for reversal, and sets out no propositions of law and the authorities relied upon to support them, as required by rule nine of this court. Appellant takes the position that he was a member of a missionary band engaged in preaching the gospel of "Jesus Christ's Kingdom," in the capacity of a witness, and the distribution of the books as he was making same, he considered a "commandment of Jesus Christ."

While appellant's belief is indisputable under the rules of this court, as stated in the opinion, the court is not bound to accept

reviewed the same and find no error to exist in the judgment of the trial court.

The same is therefore affirmed.

Judgment affirmed.

and the defendant and all other persons who were not removed
from the case and T-1 to come to trial in the interest of the
trial court.

The case is therefore affirmed.

Thomas J. Atkins.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

IN THE
APPELLATE COURT OF ILLINOIS
Fourth District

October term A.D. 1934

Term No 23

Agenda No 11

ROSETTA HUNGATE,
(Plaintiff) Appellee,
vs.
WESTCHESTER FIRE INSURANCE COMPANY,
NEW YORK CITY, NEW YORK,
(Defendant) Appellant.

} Appeal from
Circuit Court,
Franklin County.

} Honorable
Roy E. Pearce,
Judge Presiding.

279 I.A. 649²

Stone, J.

This is an appeal from a judgment of the Circuit Court of Franklin County in favor of Rosetta Hungate, appellee, plaintiff below, against the Westchester Fire Insurance Company of New York, appellant, defendant below. The action was assumpsit on an insurance policy in which appellant insured appellee in the amount of \$250.00 on a certain dwelling house and \$250.00 on certain household goods and personal effects. The policy contained a clause to the effect that the company should not be liable for any amount greater than three-fourths of the actual cash value of any item of property described by the policy at the time of the loss. The jury returned a verdict in favor of the plaintiff in the sum of \$499.00 and judgment was entered thereon.

Appellant contends that there is no sufficient evidence to show that notice of loss was given within six days after the fire. The evidence showed that two days after the fire appellee reported the loss to the local agent, informed him that the policy had been burnt, received from the agent the name of the company, wrote to the company "right off", and that an adjuster from the company appeared within a week.

October Term A. D. 1934

Agenda No 11

Term No 25

WILLIAM W. BROWN, JR.

(Respondent) vs.

vs.

NEW YORK CITY FIRE INSURANCE COMPANY,

NEW YORK CITY, NEW YORK,

(Appellant)

Appeal from
District Court,
Fourth District.

Honorable
Jury W. Brown,
Judge Presiding.

279 I.A. 649

Stone, A.

This is an appeal from a judgment of the District Court of Franklin County in favor of William Brown, Jr., respondent, against the New York City Fire Insurance Company, appellant, entered on the 12th day of October, 1933. The action was brought on the 12th day of October, 1933, and the judgment was rendered on the 12th day of October, 1933.

The policy contained a clause to the effect that the company should not be liable for any amount greater than three-fourths of the actual cash value of any item of property described in the policy at the time of the loss. The jury returned a verdict in favor of the plaintiff in the sum of \$499.00 and judgment was entered thereon.

Appellant contends that there is no sufficient evidence to show that notice of loss was given within six days after the fire. The evidence showed that two days after the fire appellant reported the loss to the local agent, informed him that the policy had been burned, requested from the agent the name of the company, wrote to the company "right off", and that no adjustment from the company was received within a week.

It is not stated whether this was a week from the occurrence of the fire or the writing of the letter. No sufficient account was given of an attempt to procure the letter and the court properly refused to permit proof of the contents of the letter, but allowed the appellee to state that she sent a letter to the company within three days after the fire occurred. The jury might reasonably have found from the fact that a letter was sent and the fact that an adjuster appeared in due course, that notice in writing concerning the loss was given. The court did not err in submitting this issue to the jury.

It is next contended that the court erred in permitting the foregoing evidence to be received after the plaintiff had rested her case. It has long been well settled that this is a matter within the discretion of the trial court, and that the discretion will not be interfered with in the absence of a showing of a clear abuse of this discretion.

Appellant urges as error the refusal of instructions 2, 3, and 4, which related to fraudulent overstatement of the value of articles destroyed, fraudulent listing of articles knowing they were not destroyed, and fraudulent listing of articles knowing she did not own the same. No evidence was introduced by the appellant as to the value of property destroyed. We do not think that the repetition of the value 98 cents for several small articles is any evidence of fraud. The fact that the insurance agent did not notice certain articles of furniture in the house at the time the policy was issued is not evidence that such articles were fraudulently listed in the proofs of loss. Appellee is a woman ignorant of the refinements of property law. The fact that she thought certain articles of property were her own "as much as her husband's" and listed them as her own, when in fact they were common property is not evidence of a fraudulent intent to deceive. Since there was no proper evidence of fraud or false swearing the court did not err in refusing to give the instructions requested.

the jury.

[illegible]

Instruction Number 1 explained to the jury that it might take into consideration the plaintiff's interest in the result of the suit. We think the point was sufficiently covered by instructions given by the court.

Appellant urges that there was a variance between the provisions of the policy declared upon as lost, and the policy offered to prove the provisions of the lost policy. While there are some differences in language used, the court does not find any substantial variance in material provisions.

The admission of the testimony of Lewis Harris with reference to the value of the building is assigned as error. The qualifications of the witness were: experience as a building contractor for forty years; acquaintance with property in the locality; acquaintance with the values of property in the locality at the time of the loss. The witness made an estimate of the cost of rebuilding the premises, and deducted fifty per cent for depreciation. There was no error in the admission of his testimony.

There was sufficient evidence that the dwelling exceeded \$350.00 in value. There was sufficient evidence that personal property destroyed in the dwelling exceeded \$375.00 in value. Three-fourths of the value of the dwelling would exceed \$250.00 and the same is true of the personal property. We cannot say therefore that the verdict of \$499.00 was excessive.

Finally it is contended by appellant that remarks of counsel for appellee were calculated to incite the jury against appellant and its counsel. The reference to counsel for appellant as high powered Chicago lawyers was not proper, and yet it would not necessarily influence the result of the trial. The trial judge who heard the speeches of counsel is in a better position to judge the effect of the remarks, and to observe the manner in which they were made, than this court is. Unless the speeches of counsel are so clearly abusive and violent that they would in all probability affect

Appellant urges that there was a variance between the provisions of the policy declared upon appeal, and the policy offered to prove the provisions of the last policy. While there are some differences in language used, the court does not find any substantial variance in material circumstances.

The admission of the testimony of Lewis Harris with reference to the value of the building is assigned as error. The qualifications of the witness were: experience as a building contractor for forty years; acquaintance with property in the locality; acquaintance with the value of property in the locality at the time of the loss. The witness made an estimate of the cost of rebuilding the premises, and deducted fifty per cent for depreciation. There was no error in the admission of his testimony.

There was sufficient evidence that the building was worth \$100.00 in value. There was sufficient evidence that personal property destroyed in the building exceeded \$375.00 in value. Three-fourths of the value of the building would exceed \$25.00 and the same is true of the personal property. We cannot say therefore that the verdict of \$400.00 was excessive.

Finally it is contended by appellant that remarks of counsel for appellee were calculated to inflame the jury against appellant and its counsel. The reference to counsel is a matter of opinion and it would not necessarily influence the result of the trial. The trial judge who heard the evidence of counsel is in a better position to judge the effect of the remarks, and to measure the manner in which they were made, than this court is. Unless the speeches of counsel are so clearly abusive and violent that they would in all probability affect

the result of the case this court must leave the matter in the sound discretion of the trial court. In view of the fact that counsel for the defense stated at the beginning of the trial that they would prove a conspiracy to set fire to the dwelling, and in view of the fact that no evidence whatever was introduced to support this statement, counsel for appellee were justified in calling upon counsel for appellant to explain the making of such an opening statement.

We find no error in the conduct of the trial, and the judgment of the Circuit Court of Franklin County will therefore be affirmed.

Affirmed.

not to be published in full.

the result of the case this court must leave the matter in
the sound discretion of the trial court. In view of the
fact that counsel for the defense stated at the trial that
the trial that they would prove a conspiracy to set fire to
the dwelling, and in view of the fact that no evidence was
ever introduced to support this statement, counsel for
appellee were justified in calling upon counsel for appellant
to explain the making of such an opening statement.

We find no error in the conduct of the trial, and the
judgment of the Circuit Court of Appeals is affirmed.

For the appellee.

Attorney.

Not to be published as full.

IN THE
APPELLATE COURT
OF THE
STATE OF ILLINOIS

279 I.A. 649³

Fourth District

October term A.D. 1934

Term No 26

Agenda No 26

SHELDON R. GILBERT and

EUNICE R. GILBERT,

Appellants - Defendants,

vs.

CHRISTOPHER BUILDING AND

LOAN ASSOCIATION,

Appellee- Complainant.

} Appeal From The
} Circuit Court of
} Franklin County

} Honorable
} Roy E. Pearce,
} Judge Presiding.

STONE, J.

The Christopher Building and Loan Association, appellee herein, complainant below, brought its bill in the Circuit Court of Franklin County against Sheldon R. Gilbert and Eunice R. Gilbert, his wife, appellants herein, defendants below, to foreclose a certain mortgage executed by the appellants to the appellee. Appellants received \$2,500.00 from appellee, and 25 shares of stock in appellee's building and loan association. Appellants executed a note to appellee by which they agreed to pay appellee monthly the sum of \$12.50 dues on the said stock, and a further sum of \$12.50 interest on the said loan, and a further sum of \$12.50 premium on the loan, until the loan should be liquidated under the by-laws of appellee corporation by the said shares of stock having reached their par value. Appellants also agreed to pay such fines and penalties as should accrue by failure to pay the said monthly sums as they came due.

279 I.A. 649

STATE OF ILLINOIS

Fourth District

October Term A.D. 1924

Exhibit

Appeal from the
Circuit Court of
Franklin County

Appellants - Defendants

SHALLON R. GILBERT and
EUNICE R. GILBERT,

Honorable
Roy E. Pearce,
Judge Presiding.

CHRYSLER BUILDING AND
LOAN ASSOCIATION,

Appellee - Complainant.

STOCK, 4.

The Chrysler Building and Loan Association, complainant herein, complains below, against the bill in this Circuit Court of Franklin County against Sheldon R. Gilbert and Eunice R. Gilbert, his wife, appellants herein, defendants below, to recover a certain mortgage executed by the appellants to the appellee. Appellants received \$8,500.00 from appellee, and its entire amount in cash in appellee's building and loan association. Appellants executed a note to appellee by which they agreed to pay appellee monthly the sum of \$11.50 upon the said note, and a further sum of \$11.50 interest on the said loan, and a further sum of \$11.50 premium on the loan, until the loan should be liquidated under the business of appellee corporation by the said association of which having received their full value. Appellants also agreed to pay the fines and penalties as should accrue by failure to pay the said monthly sum as they were due.

The mortgage which appellee sought to foreclose was given to secure the above note. On March 17, 1933, appellants having permitted the obligations to become 30 months in arrears, the board of directors of the appellee association adopted a resolution to forfeit the stock and to foreclose the mortgage.

The answer to the bill required strict proof that appellee was organized and doing business under the Building and Loan Act of Illinois, denied that the loan was made in conformance with the statute and the by-laws of appellee, and averred that the interest and premiums contracted for exceeded 7% per annum and equalled 12% per annum, that the said interest and premium did not accrue to appellee pursuant to the statute, in that appellee had not by its by-laws dispensed with the offering of its money for bids in open meeting, and in that the supposed premium was uncertain and indefinite being payable for an indefinite time, in consequence of both of which facts the premium was but a shift and device on the part of appellee to exact interest in excess of the legal rate of 7% per annum, and therefore was usurious. The answer avers that \$2,520.00 was paid by appellants and asks that the interest be declared usurious, the principal debt be declared satisfied, and the bill dismissed for want of equity.

The court below found the balance remaining on the indebtedness to be \$2,358.50 and decreed a foreclosure of the mortgage.

It is first contended by appellants that the evidence in the case is not sufficient to support the allegations that the complainant was organized and transacting business under the provisions of the Building and Loan Act of Illinois. The proof shows that the appellee association was issued a charter, that it had officers, that it had a board of directors, that the Board of Directors met regularly and made loans,

the corporation with respect to the above matters. On March 17, 1933, approximately 30 months after the date of the above resolution, the Board of Directors of the appellee corporation adopted a resolution to forfeit the stock and to liquidate the corporation.

THE answer to the bill required that proof that appellee was organized and doing business under the Building and Loan Act of Illinois, be made in conformity with the statute and the by-laws of appellee, and carried that the interest and premiums contracted for ex- ceeded 7 1/2 per annum and equaled 12 1/2 per annum, that the said interest and premium did not accrue to appellee pursuant to the statute, in that appellee had not by its by-laws dis- posed of the interest and premium as required by the statute, and in that the supposed premium was uncertain and in- definite being payable for an indefinite time, in consequence of both of which facts the premium was but a debt and de- btor on the part of appellee to exact interest in excess of the legal rate of 7 1/2 per annum, and therefore was usurious. The answer avers that \$5,820.00 was paid by appellants and asks that the interest be declared usurious, the principal be declared satisfied, and the bill dismissed for want of

100773.

The court below found the balance remaining on the indebtedness to be \$2,382.50 and decreed a foreclosure of the mortgage.

It is first contended by appellant that the balance in the sum is not sufficient to support the mortgage and the condition was stipulated and stipulated payment under the provisions of the mortgage and from AOT of Illinois.

The record shows that the parties stipulated to amend a decree, which stipulated that the court should find the balance remaining on the mortgage to be \$2,382.50 and decreed a foreclosure of the mortgage.

that it kept books and records, that it did a building and loan business for 28 years, and that appellants were stockholders and dealt with it as a corporation. The proof was at least sufficient to establish a de facto corporate existence, and its de jure existence can not be questioned collaterally in the foreclosure proceeding. FRANKLIN COUNTY BUILDING ASSOCIATION v. BLOOD, 255 Ill. App. 175. This contention is without merit.

It is next urged by appellants that the evidence is insufficient to show the adoption of a by-law dispensing with the requirement that loans shall be offered for bids in open meeting and giving the board of directors the power to fix a rate of interest and premium. The evidence offered was a printed pamphlet containing by-laws including one dispensing with bids for loans, and the statement of the president of the association, Harry Stotlar, that "The Board of Directors went over them and prepared them and got them ready to be adopted and approved by the stockholders." It is also stated that they were submitted to the stockholders. There is no evidence whatsoever that any action was taken on the by-laws by the stockholders. The copy of the by-laws was therefore erroneously admitted in evidence over the objection of the appellant. This falls clearly within the principle of the case of COBE v. GUYER, 237 Ill. 568, where it was held that the record must show what action was taken on the by-law by the stockholders. In order to justify loans made at a rate of interest and premium fixed by the board of directors, it is absolutely essential that the association bring itself within the terms of the law. The failure to do so would make the loan usurious. ANNA LOAN AND IMPROVEMENT ASS'N. v. DORRIS, 342 Ill. 567. As the improper admission of this evidence would require the case to be remanded, and as the appellants present another issue which would be controlling if decided in their favor, we must consider it.

Appellants contend that the premium for the loan in

Appellants submit that the evidence for the fact that it is a building and loan business for 25 years, and that appellants were stockholders and dealt with it as a corporation. The record was at least sufficient to establish a de facto corporate existence, and its de jure existence can not be questioned collectively in the Courtroom proceedings. *See* *WILLIAMS v. BIRMINGHAM BUILDING & LOAN ASSN., 228 Ill. App. 107, 108, 109*. That fact alone is without merit.

It is next urged by appellants that the evidence is insufficient to show the adoption of a by-law dispensing with the requirement that loans shall be offered for bids in open meeting and giving the board of directors the power to fix a rate of interest and premium. The evidence of record was a written document containing by-laws recommending and dispensing with bids for loans, and the statement of the president of the association, Harry Stotlar, that "The Board of Directors went over them and prepared them and got them ready to be adopted and approved by the stockholders." It is also stated that they were submitted to the stockholders. There is no evidence whatever that any action was taken on the by-laws by the stockholders. The copy of the by-laws was therefore erroneously admitted in evidence over the objection of the appellants. This fact alone is sufficient to reverse the judgment of the case of *CODE v. GUYER, 337 Ill. 568*, where it was held that the record must show that action was taken on the by-law by the stockholders. In order to justify loans made at a rate of interest and premium fixed by the board of directors, it is absolutely essential that the association have itself within the terms of the law. The failure to do so would make the loan unlawful. *See* *WILLIAMS v. BIRMINGHAM BUILDING & LOAN ASSN., 228 Ill. App. 107, 108, 109*. As the improper admission of this evidence would require the case to be remanded, and as the appellants present another issue which would be considered it decided in their favor, we must consider it.

this case is uncertain in that it is payable for an indefinite number of months, that is, until the time when the stock matures, which time is uncertain, and that the law requires the premium to be certain. It is not contended that the premium must be a lump sum, but simply that it must be capable of ascertainment at the time the loan is made, that is, that it must be either a lump sum or a fixed number of definite installments. Appellee contends that premium may be contracted for in the same manner that interest is contracted for, to run at a certain rate until the loan is paid.

That portion of Section 19 of the "Act in Relation to Mutual Building, Loan and Homestead Associations", (Section 393, Chap. 32, Cahill's Illinois Revised Statutes, 1933), which applies to the method of charging interest and premium is as follows:

"The board of directors shall hold such stated meetings not less frequently than once a month, as may be provided by the by-laws. At which meeting the money in the treasury shall be offered for loan in open meeting, and the shareholders who shall bid the highest premium for the preference or priority of loan, shall be entitled to receive a loan of one hundred dollars (\$100.00) for each share of stock held by said shareholders; the said premiums bid may be deducted from the loan in one amount, or may be paid in such proportionate amounts or installments and at such times during the existence of the shares of stock borrowed upon as may be designated by the by-laws of the respective associations; provided: that any such association may, by its by-laws, dispense with the offering of its money for bids in open meeting, and in lieu thereof loan its money at a rate of interest or interest and premium, to be fixed by the directors, deciding the preference or priority of the right to a loan by the priority of the approved application therefor of its shareholders; *****"

Section 23 of the same Act provides that no interest, premiums, fines, or interest on premiums accruing to the corporation "in accordance with the provisions of this Act" shall be deemed usurious. This refers us back to Section 19 above to determine what premiums are assessed in accordance with the Act.

The statute provides two methods for making loans. One requires the taking of bids for loans. The second permits

definite number of months, that is, until the time when the
-best nature, which time is uncertain, and that the law re-
quires the premium to be certain. It is not considered that
the premium must be a lump sum, but simply that it must be
capable of ascertainment at the time the loan is made, that
is, that it must be either a lump sum or a fixed number of
definite installments. Apples contract that interest is
may be contracted for in the same manner that interest is
contracted for, to run at a certain rate until the loan is
paid.

That portion of Section 13 of the "Act in Relation to
Mutual Building, Loan and Homestead Associations", (Section
505, Chap. 32, Smith's Illinois Revised Statutes, 1903),
which applies to the method of charging interest and premium
is as follows:

"The board of directors shall hold each
stated meeting not less frequently than once a
month, as may be provided by the by-laws. At
each meeting the board shall be authorized to
offer for loan in open meeting, and the share-
holders who shall bid the highest premium for the
preference or priority of loan, shall be entitled
to receive a loan of one hundred dollars (\$100.00)
for each share of stock held by said shareholders;
the said premium may be retained for the loan
in one amount, or may be paid in such proportionate
amounts as the board may determine, and the same shall be
the existence of the shares of stock borrowed upon
as may be determined by the board of the association;
associations; provided: that any such association may,
by its by-laws, dispense with the offering of the
money for bids in open meeting, and in lieu thereof
loan the money at a rate of interest or interest
and premium, to be fixed by the directors, decid-
ing the preference or priority of the right to a
loan by the priority of the approved application
thereof of its shareholders; ***"

Section 13 of the same Act provides that no interest,
premium, fine, or interest on premium accruing to the
association "is recoverable with the repayment of the same"
shall be deemed to be. This section is also in Section 10
above is identical with section 10 and is amended to read as
with the Act.
The section provides two methods for setting loans. One
method is the fixing of the rate of interest. The second method

the board of directors to loan money at a fixed rate of interest and premium. Does the statute require the premium in the latter case to be ascertainable when the loan is made?

After dispensing with bids for loans, the association may "loan its money at a rate of interest, or interest and premium, to be fixed by the board of directors". The word "rate" in the portion of the statute above quoted is used in connection with both the words interest and premium, and it is a fair inference that it means the same thing as applied to both. It may be contended that the result of an interpretation which would permit the charge of a premium to run indefinitely would be to make "premium" and "interest" the same thing. In practical effect this is of course true. However, the legislature may have used the word premium here simply to make clear the fact that a charge in addition to ordinary interest was to be permitted to mutual building associations, as well where the terms of the loan were to be fixed by the board of directors as where bids for loans were to be taken in open meeting. An additional reason for believing that the legislature intended to permit the premium charge to be indefinite where the terms were fixed by the board of directors is that in defining the second method of lending money the word "installment" is not used, and the deduction of a lump sum is not specifically authorized. Only the word "rate" is used in connection with the description of the premium.

Appellants cite no authority interpreting the Illinois statute, which requires the premium, when fixed by the board of directors, to be a definite or ascertainable sum. While, on the other hand there appears to be no authority specifically approving such a charge, such charge has, by inference, been approved by the Supreme Court of Illinois in a number of cases.

In *CANTWELL v. WELCH*, 187 Ill. 275, the court affirmed a decree of foreclosure where the borrower agreed to pay 6% per annum interest, and 7% per annum premium. In *HOME BUILDING*

the board of directors to loan at a fixed rate of interest and premium. Does the statute require the premium in the latter case to be ascertainable when the loan is made? After dispensing with this for loans, the association may "loan its money at a rate of interest, or interest and premium, to be fixed by the board of directors". The word "rate" in the portion of the statute above quoted is used in connection with both the words interest and premium, and it is a fair inference that it means the same when it is used in both. It may be contended that the result of an interest and premium would be to fix the rate of a loan, but this infinitely would be to make "premium" and "interest" the same thing. In practical effect this is of course true. However, the legislature may have used the word premium here simply to make clear the fact that a charge in addition to ordinary interest was to be permitted for actual building associations, as well where the terms of the loan were to be fixed by the board of directors as where the rate for loans were to be fixed in open market. An additional reason for believing that the legislature intended to permit the premium to be indefinite where the terms were fixed by the board of directors is that in defining the second method of lending money the word "premium" is not used, but the word "rate" is used in connection with the definition of the premium.

Appellants cite no authority interpreting the Illinois statute, which would limit the premium, when fixed by the board of directors, to a certain ascertainable sum. This we are of opinion there appears to be no authority specifically authorizing such a limit, such charge has, by inference, been allowed to the board of directors in a number of cases.

In *Central & Trust, Inc. v. Ill. St. & N. Ry. Co.*, 100 Ill. 401, 11 Ill. 401, 11 Ill. 401, the court allowed a charge of commission on the loan of money, but it is not clear that the court intended to say that the charge was to be fixed by the board of directors.

AND LOAN ASSOCIATION v. MCKAY, 217 Ill. 551, 557, the loan made bore interest at 7% per annum and premium at 7/24 of 1% per month. The court said:

"If the loan to the McKays was made in pursuance of these provisions (the by-laws) it is not to be deemed usurious, though the interest and premium contracted to be paid therefore exceed the maximum rate of interest specified to be exacted by the general interest laws of the State."

The court held that foreclosure should be granted. In COLLINS v. COBE, 202 Ill. 469, foreclosure was granted and the defense of usury was overruled where the agreement was to pay interest at 5% per annum and premium at 5% per annum.

In view of the fact that the Supreme Court of Illinois has approved foreclosures where the premium charge has been like that in this case, and in view of the fact that there is no public policy in this state condemning extraordinarily high interest charges when fixed in accordance with the law, we would not be justified in holding the loan usurious because of the indefinite premium.

However, in view of the fact that the legislature has permitted such charges to be made in the case of mutual building and loan associations only, and in view of the fact that the charges in this case are exceptionally large, this court must require the strictest proof that the association has brought itself within the letter of the Act. For the reason previously stated with respect to the adoption of the by-law dispensing with bids in open meeting, the decree of the Circuit Court of Franklin County will be reversed and the cause remanded.

Reversed and Remanded.

not to be published in full.

AND LOAN ASSOCIATION v. MCKAY, CIV. NO. 111, 1957, 8-7, the loan

made bore interest at 7 1/2 per annum and premium at 7/24 of

It per month. The court said:

"If the loan to the Kolkhoz was made in accordance of these provisions (the by-laws) it is not to be deemed national, though the interest and premium contracted to be paid therefore exceed the general interest laws of the State."

The court held that forclosure should be granted. In

COLLIER & CORSE, INC. 300 N. 3RD ST. NEW YORK, N.Y. 10001

the defense of Henry was overruled when the court was

to pay interest at 5% per annum and principal at 5% per annum.

In view of the fact that the Supreme Court of Illinois

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